S. HRG. 101-314

ACTIONS OF THE U.S. CIVIL RIGHTS COMMISSION AFFECTING THE WHITE MOUNTAIN APACHE TRIBE

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING ON THE ACTIONS OF THE U.S. CIVIL RIGHTS COMMISSION AFFECTING THE WHITE MOUNTAIN APACHE TRIBE

MAY 19, 1989

WASHINGTON, DC

U.S. GOVERNMENT PRINTING OFFICE

98-369 WASHINGTON : 1989

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S411-1

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ACTIONS OF THE U.S. CIVIL RIGHTS COMMISSION AFFECTING THE WHITE MOUNTAIN APACHE TRIBE

FRIDAY, MAY 19, 1989

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:39 a.m., in room 485, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, McCain, and Reid.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The hearing will come to order.

As a part of its study on civil rights in Indian Country, the United States Commission on Civil Rights has, among other things, taken under consideration and study a number of cases involving the role of tribal courts in the adoptive placement of Indian children under the provisions of the Indian Child Welfare Act of 1978. As a part of this effort, the Commission entered into a consultant contract with a Dr. Barry Goodfield, a marriage counselor in San Francisco, CA, to assist in the investigation.

The extent of the Commission involvement in issues regarding the Indian Child Welfare Act came forcibly to this committee's attention as a result of an unannounced and unsupervised interview of Lalita Altaha, a 14-year-old Indian child and the subject of a longstanding custody case, by Commission Chairman William Allen and Dr. Goodfield in a school yard at the White Mountain Apache Indian Reservation on February 7, 1989.

News media were present to film the interview for release to the public. The girl was transported home in Dr. Goodfield's automobile.

The event led to the arrest or detention of Chairman Allen, Dr. Goodfield, and the rest of their party by Arizona State authorities on possible kidnapping charges.

Once the whereabouts of the child was determined and the identity of the participants was known, Chairman Allen, Dr. Goodfield, and the rest of the party were released from custody.

Since the date of this occurrence, there has been a great deal of publicity about the events that transpired. The accounts of this event which have appeared in the press or otherwise presented to this committee are sometimes in conflict and frequently appear to

be factually erroneous. The event raises issues of concern and leaves many questions unanswered.

The committee has received numerous requests for an oversight hearing on this matter. It would appear to be in the best interests of all concerned that a full account of this event and the underlying circumstances that led to its occasion be put on the record. It is for this purpose, and for this purpose, alone, that this hearing is held this morning.

The CHAIRMAN. May I now call upon my distinguished vice chairman, Senator John McCain.

STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM ARIZONA, VICE CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

Senator MCCAIN. Thank you very much, Mr. Chairman.

As you stated, the purpose of this hearing is to inquire into an incident which occurred at the White Mountain Apache Reservation on February 7, 1989.

On the one hand, this incident has prompted genuine concern about the role and purpose of the Civil Rights Commission; on the other hand, the incident has prompted expressions and concern about the welfare of the child and the role of tribal governments in Indian child custody matters.

It needs to be clearly stated at the outset that this is not a hearing on the Indian Child Welfare Act. Virtually all of the relevant court orders involved in the custody case of Lalita Altaha have been entered by State courts in Texas or Arizona. None of these State court orders made reference to or rely upon the Indian Child Welfare Act.

I am hopeful that this hearing will result in a clear understanding of what happened on February 7 and why. There have been numerous statements from the involved parties and many media reports about this incident.

Our committee staff has conducted an inquiry, and the results of that investigation will be made a part of the record. We will also hear from the tribal officials and members of the United States Commission on Civil Rights.

We will not hear from Lalita Altaha or her family today. All of the information available to us indicates that Lalita has suffered emotional distress for many years as a result of the custody disputes. Competent professionals have indicated that Lalita should not be placed in a position where she is required to choose sides. It is not our desire to interfere further in Lalita's life or to place her under any additional stress. It also is certainly not our desire to become involved in any way in the issues related to the custody of Lalita. We are solely interested in the incident of February 7 at this time.

Mr. Chairman, I think it might be appropriate at this time to mention an aspect of this case which is contained in a court decision made by Judge Broomfield in the United States District Court for the District of Arizona. This judgment was rendered on May 16. I was reading through this, and there is an interesting comment about some of the circumstances. It refers, at one point, to a Mr.

Goodfield who, as you know, accompanied Mr. Allen and others on this visit.

These are Judge Broomfield's words in this decision. He said,

> Goodfield, who initially tried to characterize himself as a psychologist but later turned out to be a marriage counselor from California, and, in the court's mind nothing more than an investigator hired by the Desrochers, exacerbated and exploited Lalita's circumstances by the fashion in which he confronted and questioned her. His sincerity and motivation can seriously be questioned as his verbalizations of love and concern are contradicted by his actions, as reflected on the videotape.
>
> During this questioning he asked Lalita if she wished to have Gaynes represent her. Lalita said that she did. Although appearing to have an independent purpose of his own in traveling to the reservation, Chairman Allen appears to have prevented Goodfield from effectively moving Lalita from the reservation, as it appears was Goodfield's original intention, and not returning her to her biological parents' home after that school day.
>
> Goodfield eventually did return Lalita to her home, but with an apparent motivation, among others, to confront the mother.

The reason why I bring that up, Mr. Chairman, is that I think that this whole situation, as we will see in the tape recording, has been exacerbated by Mr. Goodfield's behavior—at least that is my view so far. I'm sure that the witnesses will elaborate on that. But I think it is interesting, for the record, to have Judge Broomfield's opinion on this issue. As you know, he is a highly-respected Federal judge in the State of Arizona.

Thank you, Mr. Chairman.

The CHAIRMAN. Would you care to have the full text made a part of the record?

Senator MCCAIN. Mr. Chairman, I think it might be helpful if the full text of his opinion was made part of the record.

The CHAIRMAN. Without objection, so ordered.

[Full text of the opinion of Judge Broomfield appears in Appendix.]

The CHAIRMAN. Before we proceed with our first panel, we will now view a videotape of the proceedings of February 7, 1989, as recorded by the NBC television crew. This appeared in the NBC Nightly News of February 17, 1989.

[Transcript of video follows:]

FIRST VOICE. At the Apache Reservation there is a battle raging these days over the status of a 14-year-old Indian girl who has been raised off the reservation.

NBC's Roger O'Neill reports tonight that among the issues being raised here is whether tribal law takes precedence over civil rights.

She was born a full-blood Apache, but for 12 years was raised by white foster parents. Now Lalita Johnson is back on the reservation, ordered by a judge to live with her natural mother. But Lalita wants out.

LALITA. I want to go back and live with my foster parents. That's all I want. I hate it here.

Mr. O'NEILL. The foster parents, Norm and Nadine Desrocher, thought they had legally adopted Lalita, but when the child's Indian mother said she wanted her back, an Arizona judge ruled the Desrocher's did not follow proper adoption procedures.

SECOND VOICE. It shouldn't be culture. It should just be Lalita. What does Lalita want.

Mr. O'NEILL. The child's natural mother said she never intended to give her daughter up forever.

MOTHER. I never forgot her in my whole entire life. I always cried for her. And then I asked the Lord to help me.

Mr. O'NEILL. Until recently, because of rampant poverty and births out of wedlock, as many as 25 percent of Indian children were placed in non-Indian foster homes or adopted. Now the tribes are trying to convince Indian mothers not to give their children up and are actively involved in trying to get them back.

Concerned about that trend, the head of the U.S. Civil Rights Commission, William Allen, and a child psychologist went to the White Mountain Apache Reservation in Arizona to investigate the case of Lalita Johnson.

THIRD VOICE. Lalita, do you feel like you are being held here against your will?

LALITA. Yes.

Mr. O'NEILL. Allen now says he believes the girl's civil rights are being violated.

FOURTH VOICE. No American belongs to anyone. Slavery is not a part of our Constitutional order. The idea that Indian children belong in some vague way to a community and not to themselves is an argument that is totally inconsistent with anything in America.

Mr. O'NEILL. The psychologist, Dr. Barry Goodfield, clearly wanted to take Lalita off the reservation.

Dr. GOODFIELD. You walk down that road and I'm going to come in a car. If you put your thumb out like you are hitchhiking, I will stop and pick you up. Do you understand that?

LALITA. Yes.

Dr. GOODFIELD. Get walking down that road.

Mr. O'NEILL. But Civil Rights Chairman Allen argued against the plan saying it would be illegal.

Mr. ALLEN. I don't care how you try to understand it. You mustn't do it.

Mr. O'NEILL. The girl was left on the reservation with her natural mother. And since Indian tribes have their own law, the Civil Rights Commission fears Lalita may have to stay here 4 more years until she is an adult.

Roger O'Neill, NBC News.

[End of videotape.]

The CHAIRMAN. Our first panel consists of the Honorable Reno Johnson, Chairman of the White Mountain Apache Tribe of Whiteriver, Arizona; the Honorable Herbert Tate, Council Member, White Mountain Apache Tribal Business Council of Whiteriver, Arizona; Chief Andrew Kane, Chief of Police, White Mountain Apache Tribe of Whiteriver, Arizona.

They will be accompanied by Ms. Claudeen Bates Arthur, General Counsel for White Mountain Apache Tribe of Arizona.

We would like to welcome all of you here this morning. Chairman Johnson, you will be first. You may proceed as you wish, sir.

STATEMENT OF THE HONORABLE RENO JOHNSON, CHAIRMAN, WHITE MOUNTAIN APACHE TRIBE, WHITERIVER, AZ, ACCOMPANIED BY CLAUDEEN BATES ARTHUR, GENERAL COUNSEL

Mr. JOHNSON. Good morning.

Councilman Tate is unable to attend this morning.

My name is Reno Johnson, Sr. I am the Chairman of the White Mountain Apache Tribe of the Fort Apache Indian Reservation in northeastern Arizona.

I am pleased to be here today, and on behalf of the White Mountain Apache people I want to express our heartfelt appreciation to the Senators on the Senate Select Committee on Indian Affairs for holding this hearing today.

Many times, Indian tribes and Indian people contact their Congressional delegations for assistance, and for various reasons. Often, assistance is not forthcoming timely. That is not true in this case. We asked for your assistance in investigating this matter, and you immediately responded. For that we are most grateful.

While you may be aware of the facts in this case, I would like to reiterate my understanding of the events surrounding the abduction of Lalita Altaha, a 14-year-old White Mountain Apache girl, on February 7, 1989.

Apparently, Mr. William B. Allen, Chairman of the United States Commission on Civil Rights, learned from one Barry Goodfield that he intended to contact the child on the White Mountain Apache Reservation.

It is unclear whether Mr. Allen was invited to go along and simply accepted the invitation, or determined for himself that a foray into the reservation was advisable.

It is also unclear exactly how the Federal marshals were brought into the picture; whether, as they said, at the request of Chairman Allen, or by a phone call from Barry Goodfield.

What is clear, however, is that the show of Federal authority by both Mr. Allen and the U.S. marshals played a significant role in the subsequent events.

Mr. Goodfield, accompanied by Mr. Allen, the two Federal marshals, an NBC News crew, and Mr. Goodfield's son and others, with obvious forethought and intent to conceal their actions and by show of Federal authority, advised the high school principal not to contact anyone concerning their presence on the reservation or their purpose.

The kidnappers and their accomplices looked for the girl at several schools before they found her by following the school bus she was on from one school to another. Having located the child, Mr. Goodfield reduced her to tears, obviously for camera effect, by immediately showing her pictures of pets from her former home with such things as "We love you and we miss you. Mom and Dad." written on the picture.

The abductors, by these actions in delivering written messages, photos of the family pets, and the gift of a book, aided and abetted the former foster parents in violating a prohibition of their probationary status resulting from a guilty plea to a felony charge which required they not contact the child. This obvious contempt by the former foster parents and their accomplices should not go unchecked.

The abductors, with cameras rolling, bombarded the child with questions. Mr. Allen asked the child if she wanted a ride home, and when she said yes, he and the U.S. marshals sat back and watched while Mr. Goodfield instructed the child to "walk down the road and pretend you are hitchhiking and I will pick you up."

From the videotapes and their own later written and oral statements it is patently clear that a kidnapping was intended and, indeed, occurred. The abductors and others helping them used the word "kidnapping."

Mrs. Altaha, the child's mother, having been called by the child's brother and advised that the child had been taken from the school grounds by strangers, pursued the vehicles, confronted Mr. Allen and Mr. Goodfield, and demanded the release of her daughter. Mr. Allen and his associates released the child and left the reservation.

Acting on these facts which clearly established that an unlawful abduction of a minor child had taken place, a request for assistance from other law enforcement agencies surrounding the reservation was issued.

We appreciate the assistance and professional response of the Arizona Department of Public Safety and the Gila County Sheriff's Office. Because of them, the suspects were stopped by law enforce-

ment officials and detained for questioning by tribal authorities. Had we not had the cooperation of these other agencies, we might not have known the identity of the kidnappers as quickly as we did.

Much was and is made of the fact that the child was unaware of a Notice of Deposition scheduled for February 10, 1989. Mr. Allen seemed to believe that the child's custody was an issue in the case in which the deposition was to be taken.

Mr. Allen simply did not bother to seek the facts. Had he done so, he would have found that an Arizona Court, on January 5, 1982, ruled that the Texas adoption decree was obtained by fraud and was invalid; he would have found that the decision was appealed and upheld on appeal; and he would have found that the Arizona Supreme Court declined to hear the case. Therefore, there is no custody dispute in this case.

Having lost their legal battle, the former foster parents became fugitives with no rights to the child. The deposition at issue relates to the natural mother's civil lawsuit against the former foster family for damages. This is not a case where the child's custody is an issue. That issue was settled by the Arizona courts in 1982.

Mr. William B. Allen's actions on the day to aid and abet other persons whose intent was to blatantly interfere with the rights of an Apache family was clearly an assault on the inherent governing powers of the White Mountain Apache Tribe.

As you know, the United States Commission on Civil Rights, through its Subcommittee on Indian Civil Rights, has for some time been conducting what it describes as an examination of civil rights in Indian Country. In particular, the Commission is examining issues concerning the Indian Civil Rights Act, tribal justice systems, and the role of the Federal Government in the area of civil rights on reservations.

Mr. Allen has impled in public statements that it is the purpose of his committee to act as a judge of tribal governments. Once again, it seems we have non-Indians eager to pass judgment on Indian people and their governments, apparently based on a false belief that they somehow better understand the so-called problems of Indian Country and are better able to deal with those problems than Indian people, themselves.

Mr. Allen has gone so far as to say that Indians must be integrated into the mainstream of America. He hasn't bothered to ask the Indian people, themselves, if this is their desire. While the Federal Government's stated policy is self-determination for Indian people, this Federal official boldly advances paternalism.

Within the boundaries of the White Mountain Apache Reservation, the Apache are sovereign. In our homeland we hold the long-cherished freedom to govern ourselves according to our laws—laws that have grown out of our culture, our history, and our religion. It is upon the foundation of this most basic freedom that tribal governments exist.

In the truest exercise of our inherit right to self-government, we, as Indian nations, must be free from outside interference with that right. Such interference undermines and chips away at the strength of our tribal governments and, if left unopposed, it will

rob us of the very will necessary to make the decisions which are vital to our survival.

Mr. Allen, on behalf of the United States Civil Rights Commission, Subcommittee on Indian Civil Rights, by his actions on February 7, 1989, has engaged in the type of unwanted and uninvited interference that I have just described.

In January 1988, the child was reunited with her parents pursuant to court orders of both the State of Arizona and the White Mountain Apache Tribal Court. Mr. Allen, using his Federal authority, saw fit to second-guess the judgment of the State and tribal courts and to become personally involved in a settled case under the guise of investigating civil rights.

Mr. Allen, under escort by Federal marshals, violated fundamental rights of an individual Apache family and the entire White Mountain Apache Tribe. Mr. Allen intruded onto the reservation without authority from the tribe. He attempted to conceal his intended actions from the tribe. And, most importantly, he violated the sacred rights of a family by interfering in the relationship between parents and their daughter.

By his actions, Mr. Allen has demonstrated a willingness on the part of the Civil Rights Commission to ignore the government-to-government relationship which exists between the White Mountain Apache Tribe and the U.S. Government.

Mr. Allen has also chosen to ignore the existence of valid tribal court and State court orders which have determined that Lalita Altaha's adoption was a fraud and that her natural parents have for many years been denied the love and affection which was their right to enjoy, but which was taken from them by the unlawful adoption.

It now appears that the Civil Rights Commission, through Mr. Allen, has engaged in the very kind of conduct that it has so loudly denounced and sought so hard to find in Indian Country.

Senators, if this can happen to one Indian child on one Indian reservation, all Indian children on all reservations are in jeopardy.

You, as leaders of this Nation, cannot allow this to happen again. Federal officials ought not be able to wield their authority to harm children. Lalita's emotional wounds were reopened for no responsible reason. Her family's fear and emotional trauma were not necessary.

Proper protocol, respect, and common courtesy for Indian people and their governments would have spared this Apache family this pain. The Civil Rights Commissioner went beyond his authority and acted beyond reason. Mr. Allen's actions should be condemned.

The statutory grant of authority to the Civil Rights Commission must be reviewed and revised if, indeed, Mr. Allen's actions can be said to be authorized by Congress.

We believe the law establishing the Civil Rights Commission and the implementing regulations clearly establish that the Commission is only a fact-finding body. We do not believe Congress intended that it should take affirmative action in individual cases.

We also believe it would be helpful for Congress, as it looks at reauthorization of the Civil Rights Commission, to delineate more clearly in the act, itself, the scope of the authority of the Commission with respect to tribal governments.

We believe the law places allegations of violations of civil rights on Indian reservations exclusively within the province of the tribal governments, themselves.

National efforts of certain special interest groups to discredit and undermine tribal governments ought not to be aided by the trustee. Such attacks upon the power of Indian tribes to manage their own affairs are contrary to the Constitution and laws of the United States.

If the Congress wants to assist in assuring that the civil rights of Indian individuals are protected, it can do so through strengthening tribal judicial systems. Furthermore, I doubt a real problem exists.

According to data collected by the United States Civil Rights Commission, itself, in 1986, the White Mountain Apache Tribal Court has an annual caseload of 4,554 cases. The Commission's own data lists only three allegations of civil rights violations. Two of those listed seem to be related to timeliness of court action, "delay in scheduling of hearings," "delay/denial of appointment of counsel," and "inability to get court records"—problems which could be remedied by additional staff and an updated, computerized, rather than manual, system of record keeping.

The third allegation listed states quite unabashedly "allegations of many abuses of civil rights—without specifically naming the violations." That is hardly a basis to conclude that civil rights violations are rampant and go unchecked on the White Mountain Apache Reservation.

Furthermore, I suggest that a public hearing in any off-reservation, non-Indian community on civil rights violations will surface more than these three allegations where court systems process at least 4,500 cases annually.

Senators, we do not deny there are problems. We simply suggest the problems are not the kind or magnitude to require Federal action which would undermine tribal sovereignty. Yes, assist us in developing better and more efficient and effective judicial systems, but don't undermine our governments in the name of protecting civil rights.

Besides looking at Civil Rights Commission's authority and delineating it more precisely, I have two further recommendations for action by Congress arising out of these unfortunate events.

Immediately following the kidnapping incident, the White Mountain Apache Tribe sought assistance from other law enforcement agencies. We received cooperation from the Arizona Department of Public Safety and the Gila County Sheriff's Office in apprehending the abductors.

Our subsequent requests that appropriate criminal charges be considered have, to date, fallen on deaf ears. Partly, this is because the local county attorney's office correctly has acknowledged that his office has no jurisdiction to prosecute non-Indians for crimes committed against Indians on Indian reservations.

Non-Indian perpetrators of crimes as serious as this incident, and even those involving sexual molestation of Indian children at schools on the reservations, go unpunished because of a jurisdictional loophole in law enforcement. The State has no jurisdiction, the tribe cannot protect itself and its citizens, and the Federal Gov-

ernment, which does have jurisdiction in these matters, simply does not act.

It is my firm belief that the non-Indian individuals who purposely violated the rights of an Apache family and the sovereign authority of the White Mountain Apache Tribe will not be called to answer for their outrageous conduct in any criminal proceeding.

This is not an isolated incident.

In 1988, the White Mountain Apache Tribe's Police Department came into contact with non-Indians in law enforcement situations in more than 500 incidents. The figures do not include the hundreds of violations of our game and fish code. Of this 538, 28 were considered serious felonies. While Federal authorities have jurisdiction over felonies, very few are prosecuted. The misdemeanors, including assaults, go unpunished by anyone. We ask the committee to seriously consider authorizing tribal jurisdiction over non-Indians, at least in misdemeanor situations.

Finally, the facts of the Lalita Altaha tragedy make it abundantly clear that Federal oversight directed at State compliance in Indian Child Welfare situations is sorely needed. Not only Congress, but the U.S. Supreme Court has recognized the importance of tribal jurisdiction over these cases; nevertheless, non-Indians feel free to forum shop in State courts to evade the legal authority of tribes.

Arizona Courts acted correctly in the Altaha situation. However, had proper Federal oversight been in place, the Texas courts could not have allowed the adoption of this Indian child in three months. Had Texas acted in compliance with the law called the Indian Child Welfare Act, the Altahas and this child might have been spared some of this grief and pain. I say "might have been" because the people involved are criminals—they purposely broke the law and evaded authorities for years. I believe you cannot, by legislation, always stop those with criminal intent, but a strong oversight role will surely assist in State government compliance with the law.

In summary, a grievous tragedy occurred and it cannot be undone. You, however, have the opportunity to assess the facts and take actions which will assure Indian families and Indian tribes that this won't happen again.

We ask you to look seriously at the authority Mr. Allen purported to exercise through the Civil Rights Commission. We ask you to consider tribal jurisdiction to protect Indian people and Indian tribes from non-Indians committing crimes against Indians on reservations. And we sincerely hope and request that you put strong Federal oversight into State compliance with the Indian Child Welfare Act.

Thank you. I and my staff are prepared to discuss with you any questions that you may have.

[Prepared statement of Mr. Johnson appears in appendix.]

The CHAIRMAN. I thank you very much, Chairman Johnson.

May I now call upon the Chief of Police of the White Mountain Apache Tribe, Chief Kane.

STATEMENT OF ANDREW KANE, CHIEF OF POLICE, WHITE MOUNTAIN APACHE TRIBE, WHITERIVER, AZ

Mr. KANE. I have nothing further to add, sir.

The CHAIRMAN. Then, if I may ask, what is the usual practice of State or Federal law enforcement authorities when they enter upon a reservation such as yours for official purposes? What is the usual practice, sir? Do they notify tribal authorities of their presence and state their purpose or request permission to enter?

Mr. JOHNSON. I would ask the Chief of Police to answer that.

The CHAIRMAN. Fine. Chief?

Mr. KANE. In regards to law enforcement services, in the past it has been the practice of the U.S. Marshal's Office to contact either the local Bureau of Indian Affairs Law Enforcement Office or the Tribal Police Department to advise them that they are in the area either to process court subpoenas, summons, or to pick up prisoners that were arrested on Federal crimes or that were on outstanding Federal warrants.

But in this incident, we did not receive any prior notice about the U.S. marshals being there to assist Chairman Allen and his staff. The BIA Law Enforcement Office was only told that these two U.S. marshals were there to serve papers and to attempt to locate a fugitive felon that was still on the loose on the reservation.

The CHAIRMAN. Is there any established practice or policy for law enforcement authorities when they enter upon a school ground in a reservation to interview a child? Are they required to, or do they provide notice to school authorities or seek permission when they intend to remove a child from the premises?

Mr. JOHNSON. I'd ask my attorney to answer that.

STATEMENT OF CLAUDEEN BATES ARTHUR, GENERAL COUNSEL, WHITE MOUNTAIN APACHE TRIBE, WHITERIVER, AZ

Ms. ARTHUR. Senator Inouye, I interviewed the principal at the High School at Alchesay High, as well as the principal at the middle school or the junior high at which the incident occurred and asked them precisely that same question.

They informed me that law enforcement officers, probation officers, both of the tribe and the Bureau of Indian Affairs, and any other Federal officials such as FBI, come on to the school grounds and proceed to the school offices. They contact the principal or the person in charge there on the school grounds and the principal, at that point, determines whether or not to allow the child to be questioned by these officers, and also makes contact with the parents if, in fact, the child is placed under arrest and there is going to be a removal of that child from the school.

[Interview with school principal, appears in appendix.]

The CHAIRMAN. Is this a policy set forth in the laws of the State of Arizona, Ms. Arthur?

Ms. ARTHUR. I am not specifically aware that they are set out in that regard.

The CHAIRMAN. It is the policy established by the——

Ms. ARTHUR. Local school boards, I believe.

The CHAIRMAN. By the tribal authorities?

Ms. ARTHUR. No. By the local school boards. The schools at which this occurred were Arizona State public schools.

The CHAIRMAN. And this is the established policy of the school board——

Ms. ARTHUR. State of Arizona.

The CHAIRMAN [continuing]. In the State of Arizona.

Ms. ARTHUR. Elected school boards. Yes.

The CHAIRMAN. Ms. Arthur, while the purpose of this hearing is rather limited and we have no intention to go into the matters of the case, itself, I believe it is still important that we understand the legal background that underlies this dispute. Can you provide us with a brief summary of the legal history of this case?

Ms. ARTHUR. Yes. I think——

The CHAIRMAN. And what part, if any, did the Indian Child Welfare Act play in any of these proceedings?

Ms. ARTHUR. I would be glad to do that.

I think the most clear and concise summary appears in the Arizona Superior Court, Pima County, proposed findings and facts and conclusions of law that were entered in 1982. This is what the court found.

Thurza Altaha was the mother of Lalita. She was born in Phoenix in December 1974. The child is an enrolled member of the White Mountain Apache Tribe, a legal resident of the Fort Apache Indian Reservation in the State of Arizona during all times material to that action, including December 1, 1976, until after March 1977.

The Desrochers are legal residents of Arizona during all times material to this action, including the period December 1, 1976, until March 1, 1977.

In June 1975 a child was taken to Tucson, AZ, and through a place called The House of Samuel was placed in the home of the Desrochers.

In November 1975 the mother picked up the child in Tucson and took her back to the Fort Apache Reservation.

Soon thereafter, the mother asked the Desrochers if they would again take temporary custody of the child. A House of Samuel employee brought the child back to Tucson in December 1975. The child resided continuously with the Desrochers from December 1975, until January 1988.

The mother then moved to Texas.

The Desrochers, having heard that the tribal court was going to allow the aunt of the child to pick up the child fled to Texas in December 1976.

They intended in Texas to have the natural mother sign papers terminating her parental rights. The court in Tucson found that by going to Texas after being advised of the tribal court order, the Desrochers were, in effect, fleeing in the face of that order and were attempting to avoid its possible affects.

After arriving in Texas and contacting an attorney, obtaining a waiver, fraudulently, from the mother, the petitioners filed a petition in Texas for adoption in January.

Soon thereafter—three months thereafter—in March 1977, the Texas court issued an order of adoption. The Desrochers then immediately moved back to Tucson and, in February 1979, the natu-

ral mother filed a writ of habeas corpus in the Arizona district court seeking to set aside the Texas order.

The Texas court order, indeed, was set aside for the following reasons, which are not based on the Indian Child Welfare Act.

The Texas court lacked subject matter jurisdiction to enter the termination and adoption decrees because the child, the Desrochers, and the natural mother were all legal residents of Arizona, not Texas, during the period from December 1, 1976, until after March 1977.

The Desrochers' act of representing to the Texas court that they and the child were legal residents of Texas was determined to be extrinsic fraud, which denied the natural mother and the child the protection of the laws of Arizona, the State of their domicile.

The jurisdictional findings of the Texas court in the termination and adoption decrees were disregarded because— and this is the court's words—"the issues of residence and jurisdiction were not litigated in the Texas proceedings."

The Arizona court then found "The Texas termination and adoption decrees are void and will not be granted full faith and credit because they were entered into without subject matter jurisdiction and as a result of extrinsic fraud."

There is no mention of the Indian Child Welfare Act.

After this order came—of course, it wasn't in existence at the time of the beginning of these events. Subsequent to that time, the court ordered that the child, on the habeas corpus writ, be returned to the White Mountain Apache Reservation.

The Desrochers then fled and were in hiding for six years. The Pima County Attorney's Office in 1987 issued a warrant for their arrest and made it known to their attorneys and their relatives that they would, indeed, be arrested if they could be found.

During that 6 years, the White Mountain Apache Tribe, the Legal Services Corporation which represented the mother, and the mother, and the families, themselves, attempted, with private investigators and other law enforcement officers from the State of Arizona, as well as other jurisdictions, to find the child.

The Desrochers lived on the road, failed to put the child in school, and evaded authorities for those six years.

Once the warrant was issued for their arrest, apparently on the advice of their attorney they returned to the State of Arizona and gave themselves up to the authorities in Pima County.

They then, in January 1988, plead guilty to a felony charge. Part of that plea included the fact that they would not contact the child for three years. This was based on a psychological report that indicated that it would be very hard for the child to adjust to her own family on the reservation if she was contacted by the Desrochers.

Subsequent to that time, the Desrochers, in violation of the order of prohibition, tried to contact the child. They made phone calls to her home, to a family with whom she was staying for a short period of time.

They finally, through their attorney, Mr. Alex Gaynes, attempted an incorrect procedure in tribal court to claim that the child was neglected. The proceeding in tribal court was referred to social services. Despite the fact that it was not a proper procedure, the tribal court looked into the matter requiring a home study. The

report returned to the tribal court, and the tribal court, at the request of the mother, dismissed on a motion to dismiss, dismissed the tribal court proceedings, and no further action was taken in that case.

In March of this year Mr. Gaynes, the attorney for the Desrochers, filed a complaint in the Federal District Court for the State of Arizona against the natural parents, against the Legal Services Corporation, against the White Mountain Apache Tribe, and against the Bureau of Indian Affairs. His complaint was couched in the nature of a preliminary injunction, and seeking, also, a writ of habeas corpus asking all of the defendants to release Lalita and allow her to attend a hearing for a preliminary injunction.

The court declined to sign the writ, but did have a hearing on the application for a preliminary injunction.

At the hearing, the court addressed the question of subject matter jurisdiction. And the court order, which has been placed in the record, addresses the question of the limited jurisdiction of Federal courts. Judge Broomfield denied the writ and dismissed the case, ordering that the preliminary injunction was dismissed for lack of subject matter jurisdiction, and the complaint in the action is dismissed.

The court, in looking at that, did hear testimony from Barry Goodfield, as well as the mother, as well as Mrs. Desrocher.

I believe that one of the concerns that we have had with all of this is the fact that Mr. Barry Goodfield, whatever his credentials, has exacerbated and exploited—"exploited" is the word that was used by Judge Broomfield after hearing the case—this situation. The fact that he would be hired as a consultant by the U.S. Civil Rights Commission comes as very inexplicable.

I sought from the U.S. Civil Rights Commission, in a freedom of information request, documents which would indicate how Mr. Goodfield was hired by the Commission. They have not produced those documents. Either they don't exist, or they simply haven't produced them at this time. All they produced were vouchers showing that Mr. Goodfield was paid on a contract at some time in the past in August 1987 and 1988.

The CHAIRMAN. I thank you very much.

Without objection, the findings of fact and conclusions of law of the Pima County Superior Court dated September 1981, in the case of *Goclanney and White Mountain Apache Tribe* v. *Normand George Desrocher and Nadine Desrocher* will be made part of the record at this time.

[Findings of fact and conclusions of law of the Pima County Superior Court dated September 1981, appear in appendix.]

The CHAIRMAN. What services, if any, have the White Mountain Apache Tribe provided to Lalita and the Altahas since Lalita has been returned to the family?

Ms. ARTHUR. Mr. Chairman, before this child was returned to the White Mountain Apache Reservation, the guidance center, which contracts with the Indian Health Service for mental health services, set up counselling services for this child. This child has been in counselling services provided by the Social Services Department of the White Mountain Apache Tribe from the time she returned to

the reservation in January 1988 through the recent court decisions here in April 1989.

She has had individual counselling. Her family has been involved in family counselling. And she has seen both licensed psychiatrists, as well as psychologists, who are on contract through the Indian Health Service to the tribal guidance center.

We believe that one of the misconceptions that occurs— and I believe, personally, that it is an underlying racial matter—that somehow there is a perception that Indian tribal government, that Indian tribal court judges, and that Indian tribal social services people are blindly placing Indian children where they don't belong.

We have our own money at White Mountain Apache, as well as Federal money, for social services, for guidance and counselling services. Indian tribes, as many State governments and county governments and cities throughout this country, also provide their people with social services, including counselling types of services. This child has been provided those services.

At the April 1989, hearing, Dr. Mark Hite, a psychologist with the Public Health Service at Whiteriver, testified that a few weeks before he had had a counselling session with Lalita, that she was a well-adjusted, happy teenager, that she expressed to him her desire that she stay with her Apache family and learn the Apache ways.

He also explained quite explicitly to us that the actions that were being taken were actions which seemed to be directed at making this child make a choice. He explained to us that children—it is detrimental and, in fact, sometimes destructive of children to insist that they choose between two sets of people whom they know and love.

Lalita, we admit, lived with the Desrochers for many, many years. She can't help but love them and care about them. She also knows and loves her Apache family.

The actions of Mr. Goodfield and Mr. Allen seem directly to be aimed at making this child make a choice and putting her in a no-win catch 22 situation. If she says she wants to go with the Desrochers, she said to me, personally, "Then I'm hurting my Apache family. If I say to my Apache family I'm happy here and I like it here, then I'm hurting the Desrochers."

Our psychologist tells us not to do this to children. You can't do this to children. It is easier for children to accept that fact that some outside third entity—the courts, in this case—make that decision for you. Then you find that, as a child, acceptable. I'm not being forced to choose. I can be happy on the White Mountain Apache Reservation and miss my foster family because I know that is not a choice that I am required to make. Because if you make me choose, you're putting me in a catch-22 situation.

We are told that is destructive of children. We think that's what Mr. Allen and Mr. Goodfield are doing.

The CHAIRMAN. Is the White Mountain Apache Tribe a treaty tribe?

Ms. ARTHUR. We have a Constitution under the 1934 Act.

The CHAIRMAN. And is there a treaty existing between the tribe and the United States of America?

Mr. KANE. Yes.

Ms. ARTHUR. Correct.

The CHAIRMAN. And when was this reservation formed?

Mr. KANE. Mr. Chairman, I think it was in 1878 by then U.S. President Grant through an Executive Order. That is when the White Mountain Fort Apache Indian Reservation was established.

The CHAIRMAN. And you have a duly constituted government?

Mr. JOHNSON. Yes.

The CHAIRMAN. And the positions of the tribal chairman and council members are elected positions?

Mr. JOHNSON. Yes; we are, Mr. Chairman.

The CHAIRMAN. Do you have a law enforcement agency in the tribe?

Mr. JOHNSON. We have a tribal law enforcement agency.

The CHAIRMAN. And who appoints the chief?

Mr. JOHNSON. The tribal council.

The CHAIRMAN. Is the tribal council elected on a regular basis?

Mr. JOHNSON. They are elected every 4 years.

The CHAIRMAN. Has your sovereignty ever been questioned by the State of Arizona?

Mr. JOHNSON. I would have to turn to the attorney on that.

Ms. ARTHUR. On a case-by-case basis, depending on the issue involved, we do have our disagreements with the State of Arizona.

In this situation and in these types of situations we have found the State of Arizona to be cooperative in giving us information and giving us notice. Consistently we receive notice from the State of Arizona Welfare Department and State court systems when our children are involved in court proceedings. We greatly appreciate the assistance of the law enforcement agencies that assisted in this particular incident. We believe that kind of cooperation can and should continue, and that it is the individuals in this case who sought to evade authority that have caused the problem.

Senator MCCAIN. Mr. Chairman, I think I can state with some expertise that the relationship between the White Mountain Apache Tribe and the State of Arizona is one of steady improvement, but also of respect for the sovereignty of the White Mountain Apache Tribe.

The CHAIRMAN. Thank you very much, sir.

Has the U.S. Government questioned the status of sovereignty of the White Mountain Apache Tribe in the last 20 years?

Ms. ARTHUR. Absolutely not.

The CHAIRMAN. May I call upon Senator McCain.

Senator MCCAIN. Thank you, Mr. Chairman.

This story becomes more and more bizarre, and I hope that in the course of this hearing we can resolve some questions not only regarding the incident, itself, but also the events and circumstances that led up this event.

For example, I do not understand what expertise or talents Mr. Goodfield has which would lend himself to be hired by the Commission. I think it is a serious question of conflict of interest if Mr. Goodfield was representing the foster parents at the same time that he was involved with a member of the Civil Rights Commission. I think that is clearly a conflict here.

I'd like to know—and maybe Chief Kane can tell me—what were the marshals doing on the reservation? Do you know, Chief?

Mr. KANE. When they arrived they were under the guise of locating a Federal fugitive. That was their explanation to the BIA law enforcement officer when they arrived that same morning. And then subsequently, in the afternoon, they assisted Mr. Allen and his group in locating the girl.

It seems like, from what we found out later, that the U.S. marshals were contacted prior to their arrival to Whiteriver, and that they met Mr. Allen and his group at Salt River Canyon, which is about 60 miles south of Whiteriver. From there they escorted the group—Mr. Allen and his group——

Senator MCCAIN. They met them off the reservation, Chief?

Mr. KANE. At the reservation's boundary.

Senator MCCAIN. And escorted them on the reservation.

Mr. KANE. Escorted them on.

Senator MCCAIN. In the guise of seeking a fugitive?

Mr. KANE. I don't know. We were not—"we" meaning the law enforcement officers, both tribal and BIA—aware at any time until after it was reported to us that Mr. Allen and his group were on the reservation.

Senator MCCAIN. How long have you been the chief?

Mr. KANE. I've been the chief since May of 1982.

Senator MCCAIN. And you've been involved in law enforcement on the reservation for how long?

Mr. KANE. For the past 13 years.

Senator MCCAIN. Have you ever known the Federal marshals to come on before?

Mr. KANE. Yes; they have come on the reservation, but for specific reasons. They have stopped by both offices telling the agency in charge and the chief of the police their intention of being on the reservation and what they were there for. Usually either our BIA criminal investigator or the tribal policy officer would assist them in locating particular people.

Senator MCCAIN. Does it sound a little strange that they would be there ostentatiously for the purpose of finding a fugitive, and yet spending their time escorting the group that came on the reservation?

Mr. KANE. Yes, sir; that has been quite a concern to us. They only spent one day in trying to locate that prisoner, which would be a day after February 7. On February 8 they spent the day and they saw the fugitive run off on them, and then they left the area. Since then they never came back, nor any other representative from the U.S. marshals ever came back to locate that same prisoner.

This past Saturday tribal police officers apprehended that same fugitive, and now he is back in Federal custody.

Senator MCCAIN. It would be unlikely that fugitive would be hiding out in the school?

Mr. KANE. Very unlikely, sir.

Senator MCCAIN. Let me say before I continue the questioning, Mr. Chairman, I know Chairman Johnson, I know Ms. Arthur and Chief Kane. I have had a long relationship with all three of them. I consider them highly credible witnesses and outstanding public servants to their tribe and to the State of Arizona. I place great

credibility on their testimony, and I hope that this committee will do so, as well.

Chief Kane, when did Ms. Altaha make the charges of kidnapping? At what point in this scenario?

Mr. KANE. At 4:05 p.m. on February 7 the police department received a call from a neighbor of Ms. Altaha. Ms. Altaha had requested police officers in regards to her being harassed by news people.

So at 4:48 p.m. police officers from about 25 miles from Cedar Creek arrived at Ms. Altaha's residence. Then Ms. Altaha informed the officers that her daughter was abducted. Officers did not see the Lalita at the home, so he, the officer, in turn informed the headquarters that an abduction had taken place and he relayed the necessary information to the dispatcher, who, in turn, immediately contacted the surrounding law enforcement agencies to be on the lookout for those particular vehicles and the number of persons that were involved in this incident.

Senator MCCAIN. Chief, the daughter was not at home at the time these charges were made?

Mr. KANE. At that time the officer did not see her, but apparently she was there. But the officer did not see her.

Senator MCCAIN. Should the officer have seen her?

Mr. KANE. Yes; if there was an abduction, that's the first thing the officers are asked to look for to see if the girl has been returned or to get a description of the girl so that it can be appropriately relayed to other law enforcement agencies.

Senator MCCAIN. Chief Kane, in your professional opinion, if a Federal marshal saw a child taken from a school bus, should that officer intervene?

Mr. KANE. According to the U.S. marshals that responded to that same question, they are saying it was their understanding that the girl was going to be taken as far as Cedar Creek, and then if the girl was taken beyond Cedar Creek they were going to stop the car and make sure that the girl did not go beyond Cedar Creek.

But in our practice, we don't allow other children to be removed from school grounds without the consent of the parents.

Senator MCCAIN. I think all of us, speaking as parents, would be very concerned if our child was taken off of a school bus. I also think we'd be concerned if that person were interviewed by anyone without the presence of the school principal or the parent. Would you agree with that also?

Mr. KANE. Yes, sir; in that same respect, police officers in both the White Mountain Apache Reservation and the surrounding areas, when they enter the school grounds to interview children, first they seek permission from the parent for that interview.

Senator MCCAIN. You have no evidence that any of the school authorities were notified?

Mr. KANE. The only information we got was from the Alchesay High School principal. When the U.S. marshals and Dr. Goodfield and Mr. Allen entered the school building, they asked for the whereabouts of Lalita—where she went to school. The high school principal responded that the girl was not a student at Alchesay High School.

And then, in turn, the U.S. marshals, before they left to go to the other school, were instructed by the U.S. marshal not to call anybody for the next 30 minutes.

Senator MCCAIN. Chief Johnson, were you or Ms. Arthur notified of any part of this activity that there was going to be the presence of these individuals on the reservation or what they were going to do or anything of that nature?

Mr. JOHNSON. Mr. McCain, I was notified that evening at the restaurant—I was there on other business——

Senator MCCAIN. After the incident or before?

Mr. JOHNSON. Yes; the incident.

Senator MCCAIN. After?

Mr. JOHNSON. After.

Senator MCCAIN. There was no notification of tribal authorities that this——

Mr. JOHNSON. My office was not notified prior to any of this. It was after the incident.

Senator MCCAIN. To your knowledge, no tribal authority was notified that this visit would take place?

Mr. JOHNSON. I have done intensive investigation with my people. Nothing. They were not notified at all.

Senator MCCAIN. Indeed it is a bizarre case, Mr. Chairman, and I certainly think we need to find out a lot of things, including what these Federal marshals were doing there, and, once they were there, why they didn't carry out their duties when obviously there were clear violations of the law taking place.

It is your view, Chairman Johnson, with all the evidence at hand, that Mr. Goodfield clearly wanted to remove the child from the reservation?

Mr. JOHNSON. Yes.

Senator MCCAIN. And, Ms. Arthur, it is your view that such an event would have been in total violation of several court decisions made by non-Indian Federal court that there was absolutely no legality for such action; is that correct?

Ms. ARTHUR. Absolutely none, and I'm very concerned about the Federal presence being involved in that.

Senator MCCAIN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Are the United States marshals identified by name and rank in any of the proceedings?

Ms. ARTHUR. Yes, they are.

The CHAIRMAN. Do you have their names?

Ms. ARTHUR. Yes, we do.

The CHAIRMAN. I would like to have them for the record. Will you read them out loud, sir?

Mr. KANE. One identified his name as J. R. Skaggs.

The CHAIRMAN. How do you spell that?

Mr. KANE. His last name was S-k-a-g-g-s. And the other one identified himself as R. L. Morris.

The CHAIRMAN. How do you spell that?

Mr. KANE. His last name is M-o-r-r-i-s.

The CHAIRMAN. And where were they stationed at that time?

Mr. KANE. I believe they were from out of the Phoenix Office, and that they were staying in a motel in Show Low, which is about

35 miles north of Whiteriver at the time Mr. Allen's party was stopped by Arizona Department of Public Safety and Gila County Sheriff's Office. Somehow, they received information about that incident in the Globe Area, and they received a call from their Phoenix Office. And then, in turn, these two marshals met myself and a BIA criminal investigator, Vincent Hubbard, at the Gila County Sheriff's Office where these two marshals informed us about what took place prior to our receiving the call of this abduction.

Senator MCCAIN. Mr. Chairman, may I interject here for a second? Along this line of questioning, there is a statement that I think should be included in the record by Mr. John J. Twomey, who is the Deputy Director of the U.S. Marshal Service, submitted to this committee. He says,

> I received a phone call from Stella Duran, who identified herself as executive assistant to William Allen, Chairman of the U.S. Commission on Civil Rights.
>
> Ms. Duran advised me that Chairman Allen was scheduling a trip to Arizona for the purpose of taking a deposition on the White Mountain Apache Indian Reservation. Ms. Duran stated that she was seeking authorization for deputy U.S. marshals from the district of Arizona to accompany Chairman Allen to the reservation because there were concerns for his safety.

It seems to me there is a contradiction here. Chief Kane was told that they were searching for a fugitive, and it appears as if the U.S. Marshal Service assigned these individuals to "take care of Mr. Allen's safety." I think we ought to find out about that.

And I think it also might be well to highlight the end of the statement. He says,

> For the record, I would note that Ms. Duran did not inform me of the nature or circumstances of the case with which Mr. Allen was involved. Also, no mention was made to me of Doctor Barry Goodfield, his status, or his role. Further, I was not advised that a television news crew would be present.

So I think another issue to be resolved here is what those marshals were doing.

The CHAIRMAN. This is not a court proceeding, nor is it an investigation to determine the criminal culpability of any person involved; therefore, I did not request that anyone take the oath before testifying. However, some of the incidents, as described by the Chief here, are not only bizarre, as the vice-chairman has described it, but should be a matter of grave concern to Members of the United States Senate.

You described this incident where one of the deputy U.S. marshals instructed a school official not to call anyone for 30 minutes?

Mr. KANE. Yes, sir.

The CHAIRMAN. Can you identify the school authority or official?

Mr. KANE. Yes, sir. The school authority's name is Mr. Tracy Carrington. He is the high school principal for Alchesay High School. There was another clerk that was in there with Mr. Carrington. I don't have her name here. Both Mr. Carrington and his office aid were instructed by one of the marshals—later he identified Marshal Morris as the one that instructed them not to call anybody for the next 30 minutes. So under that instruction they made no calls to anybody.

The CHAIRMAN. I am now instructing the staff of this committee that they are authorized and instructed to go to Arizona to get an affidavit from these two to cover this incident.

I think the record should show that we invited the marshals to testify at this hearing, but the Department of Justice has advised that they would not be permitted to do so.

Ms. ARTHUR. Senator, if I might, we did get written statements from both the high school principal and the junior high school principal the day following the incident. I interviewed both of them with a person present. If the committee would leave the record open, we would be glad to make those transcribed statements available to the committee.

The CHAIRMAN. We would appreciate that very much. Without objection, the communication from the Acting Assisting Attorney General, Harold T. Crawford, dated May 5, 1989, addressed to me in response to our letter of April 17 will be made part of the record at this time.

[Letter from Acting Attorney General Crawford dated May 5, 1989, appears in appendix.]

The CHAIRMAN. Attached to the attorney general's letter is a statement by John J. Twomey—the statement that the vice chairman described. And this statement signed by John J. Twomey on May 1, 1989, will be made part of the record, as well.

[Prepared statement of Mr. John J. Twomey appears in appendix.]

The CHAIRMAN. Chairman Johnson and Chief Kane and Ms. Arthur, I thank you very much for your participation.

Our next panel consists of: the Chairman of the United States Commission on Civil Rights and the Chairman of the Subcommittee on Indian Civil Rights, Commissioner William B. Allen; and Commissioner Robert Destro of the United States Commission on Civil Rights and member of the Subcommittee on Indian Civil Rights. They will be accompanied by: Mr. William H. Gillers, Solicitor; Mr. William J. Howard, General Counsel; Mr. Melvin Jemkins, Acting Staff Director; and Mr. John C. Eastman, Director of Congressional and Public Affairs.

Commissioner Allen, Commissioner Destro, and gentlemen, welcome.

Mr. ALLEN. Good morning, sir. Thank you.

The CHAIRMAN. We have received your full statement. You may proceed as you wish, sir.

STATEMENT OF COMMISSIONER WILLIAM B. ALLEN, CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS AND CHAIRMAN OF THE SUBCOMMITTEE ON INDIAN CIVIL RIGHTS, WASHINGTON, DC

Mr. ALLEN. Thank you, Mr. Chairman and committee members. I will be delighted to open. You have received my statement for the record. I will not read that rather lengthy statement, but I will take a few moments to characterize the testimony contained therein.

The CHAIRMAN. Without objection, your full statement will be made a part of the record. It will be included in the record immediately following your oral remarks.

Mr. ALLEN. Thank you, sir.

At the outset, permit me to say that the occasion that brings us here is one I regard with extreme seriousness. I think it is very im-

portant, both to the purposes and the rights of the White Mountain Apache Nation, as well as to the practices of the Commission on Civil Rights and the laws of this Nation.

The specific occasion is, of course, the circumstance of Lalita Altaha, about which people—well-intentioned people—disagree. Some people, including even members of the Commission on which I serve, are of the position that Lalita is all right. There are people elsewhere at the tribe and, indeed, in this body. I do not think that is the case. I think not only is Lalita not all right, but Lalita is really every Indian child. And so I have tried to make clear in the course of the remarks in this testimony why I believe that to be the case.

It is nevertheless true that the circumstances which led me to Whiteriver, AZ, on February 7 need to be particularly understood and articulated, and they really begin in a serious concern with the subcommittee's study of the enforcement of the Indian Civil Rights Act as that study matured into a focus on the Indian Child Welfare Act.

One of the consequences of that burgeoning concern was the ICWA was to take a close look at a case which arose in California called the *Pitts-Keetso* case roughly this time last year. In the process of doing so, I indeed introduced to the Commission someone whom the parties in the *Pitts-Keetso* case had introduced to me; namely, Doctor Barry Goodfield.

Doctor Goodfield served to allow us to mount a brief but important hearing in July 1988 on that subject.

The work that he performed for us was limited, intended at the outset to be limited. It is nevertheless the case that he became involved with cases other than those with which we set out initially and brought information on those cases to our attention as a subcommittee.

In doing so, we were led then to consider how far to pursue these additional lines of inquiry. We decided in due course that particularly information presented on what is now known as the Altaha case—which, at that time, was called the *Desrocher* case—was not mature for consideration, and we chose not to consider it.

Among the elements of that case which seemed not mature was, of course, the fact that Mr. Goodfield had presented only one side of the story, and it would not have been possible for this subcommittee to hold a balanced hearing on the basis of that one side of the story.

It was further reported that the case was involved with what seemed to be imminent litigation—a dependence hearing—which it seemed well to permit to progress on its own terms.

Later that fall we received at the Commission—the subcommittee and the staff—a letter from an attorney in Montana who had, in fact, been present at our hearing. That letter had not to do with the *Desrocher* or *Altaha* case, but with a case called the *Baier* case. The attorney was a Mr. Unger.

Mr. Unger led us to understand that his case had been judged at trial court level, and that the trial court judge had, in fact, confirmed jurisdiction in the State of Montana for Mr. Unger's client.

I responded to Mr. Unger with a brief, handwritten note saying, essentially, thank you for sending the copy of the opinion and congratulations.

For whatever reasons, Mr. Unger apparently shared that note with his client, who telephoned me. Upon receiving their call, in which they expressed gratitude for what I took to be a formal note of congratulation, they further expressed concern about a pending court date in the *Desrocher-Altaha* case. I didn't know about that and hadn't heard about it prior to that time other than what I have already indicated; namely, in June and July we thought a dependency hearing was imminent.

They said there was a court date. They did not elaborate, and I did not cross examine them. I acknowledged the information and did not pursue it, although I expressed interest in it, to be sure.

I heard roughly two weeks later from Doctor Goodfield that he had, indeed, continuing interest in these cases, though he was no longer associated with the Commission on Civil Rights, and that he, in fact, was going to go to this hearing, whatever this hearing was. He invited me to accompany him.

I said to him "No, I will not accompany you, but please keep me informed of whatever transpires."

At that point my interest was very clear: I wanted to know how the hearing turned out. I wanted to know whether, indeed, the processes—which I have elaborated in my written testimony to you—had corrected what seemed to me a fatal defect at the outset of the Altaha process.

I heard later that the hearing or deposition or whatever it was—which was becoming vague by then—did not take place, and that there was serious question as to why it did not take place and about the circumstances of the youngster, Lalita Altaha.

I next heard from Mr. Goodfield several weeks later saying he was going to go back. I initially did not respond to his calls. I was busy, I'm sure. Eventually he talked to me and said he was going back. After a series of conversations or phone calls in which he made that clear, I began to have certain kinds of concerns based on the experience of the prior summer and the representations of my staff that perhaps Mr. Goodfield's concern would not be in the interest either of the Commission or of the child, though I would not judge that and would not say finally even to you here that that was the case.

But I was concerned enough, based on my experience, to think that perhaps I should pursue my own interest and, at the same time, make certain that the Commission was not implicated in whatever Mr. Goodfield might be doing.

Therefore, I finally consented that I would make the journey there on February 7 and asked my assistant to make the appropriate arrangements in order to accomplish that.

Now, I tell that story of the origins of this trip so that you will place things in perspective. There was not one reason, but several reasons combined in a complex process of rationalization that lead me to determine on travelling to White Mountain at the time that I did.

I went there, and you know now the result of my journey. You know what I discovered and why I say Lalita is not all right. You also know that not everything that unfolded according to Hoyle.

I am, in one sense, very pleased with the results of what transpired there, because I think I have made clear once and for all the limits of Dr. Goodfield's ability to represent himself as continuing in association with the Commission. I also think that my presence was essential in order to avert why might otherwise have been a deeper tragedy than ultimately transpired.

I think in the long run, however, it is impossible to deal with the questions of what transpired at Whiteriver, Arizona, on February 7 without dealing with the fundamental question of how these processes unfold in the first place. I think that one will have to, in the coming weeks, as we take up specifically in a course of hearings the ICWA, one will simply have to reflect on whether, indeed, there isn't some curious dynamic at work through which we foster the kinds of tragedies that are represented here.

It is said, I believe, in the case of adoptive parents, that they have to go through a difficult period of emotional and psychological adjustment. An adoptive parent often has this eerie feeling—call it a fear, if you will—that someone is going to take their child away. It takes a while before they are accustomed to the notion that this really is our child. This means, of course, that these are extremely sensitive relationships that one must deal with with the greatest sensitivity.

I believe that the problem in the case of the Desrochers is largely a reflection of that kind of emotional tension coupled with defects in the process by which changes in the status of Lalita Altaha were made, starting at the outset with what I describe in my remarks as a "knock in the night," from the perspective of the Desrochers, informing them that the child who was in their foster care was to be removed from them.

Now, in my written testimony what I have done, after some reflection, is to simply share with you the response I gave to someone from Wisconsin who signed him or herself "Yamel." Yamel wrote what I took to be a fairly cogent indictment based on published misperceptions about my purposes and, indeed, my conduct.

I think I have responded in these remarks to Yamel completely to the concerns with the manner in which I have conducted myself. I think I have further gone on to make certain that it is understood that I take very seriously—I take, indeed, with ultimate seriousness—the purpose and the importance of defending the full citizenship of American Indians.

I take equally seriously that we have not accomplished in this country the statement and the support of that notion of full citizenship on a grounds which is morally, as well as legally, compelling, and that our failure in that regard will continue to expose American Indians to the kinds of difficulties we meet with in this case.

I believe that there are a number of factors that require careful regard. I am not making formal recommendations here this morning. I would hope, having the occasion to talk about the ICWA when those hearings unfold, to do so at that time with respect to the very narrow concerns that I, personally, have developed.

But I will say this: I believe that Chairman Reno Johnson from the tribe, in one of the recommendations he made, points to a fundamental concern that needs now to be addressed, and that is his recommendation which this somewhat never-never land of jurisdiction with respect to crimes committed on reservations and whether crimes are committed by Indians or non-Indians and who has authority to prosecute those crimes.

I believe that it is intolerable that that vacuum continues to exist. There are certain things that transpired on the date of the 7th which remain yet for me a question mark—a question mark largely generated by these confusions over jurisdiction.

I have, indeed, requested an FBI investigation, that has not yet been completed, into questions that remain even after all of the documents that you now possess and that I possess about that event. I am hopeful that investigation will permit us to see more clearly how we should go about resolving these issues.

But it is clear now that one cannot leave this vacuum existing between tribes and States and the Federal Government with unclarity as to who holds complete responsibility.

Perhaps you are not aware that, indeed, the sheriff's department in Gila County, Arizona, with respect to a separate case, was under an existing court order governing its attempt to enforce or to prosecute actions committed on reservations—not the White Mountain Apache Reservation. But it is, nevertheless, true, and it therefore raises serious questions about what transpired on the event of February 7.

A number of misrepresentations have infected public statements and, indeed, internal communications here at the committee and within the Commission on Civil Rights about the events of February 7. I hope today that we accomplish at least this much: That we put to bed those misrepresentations.

It means little to me personally, to be perfectly candid with you, what assessment we arrive at regarding my own conduct and motive if—and this is the condition. It is a hypothetical, I might remind you—if, in the process, we can arrive at a clear-headed view of how we intend to deal with these questions in this United States. I would think that would be a net gain, whatever one thought of William Allen in respect to these particular questions.

Now, the Commission on Civil Rights—and I want to close on this reflection, which is continuing a rather loose description of my testimony. The Commission on Civil Rights, as you know, is a body that has no authority other than the authority to speak. And it only has that authority when it speaks collectively. Its chairman does not speak for the Commission except, of course, when the chairman is quoting actions taken by that collective body. Nor, indeed, does the chairman have any active executive authority at the Commission. That is the way the body has been established.

The chairman's role is limited to setting the agenda and to presiding over Commission meetings.

It is the body, itself, that ultimately will have to come to terms with the kinds of issues I am presenting to you. It is the body which is concerned in studying the enforcement of the Indian Civil Rights Act of 1968, and that ultimately ought to be making recommendations to you.

But I hope that you can see, as I think most of the world now sees clearly, that a body which has been as seriously infected for the past several years is seriously politically incapacitated for the past couple of years with divisions that are not merely internal to the body, but that involve that body in enormously complex political machinations here on this Capitol Hill, as well as at the White House, is a body that is not going to have immediate possession of the resources required to work hand in hand with you. We aim to reach that point. We are not there at this moment.

If we reach that point, it will be because there has been a change in the tone that animates our discussions over these kinds of issues. It will be because a spirit of cooperation has replaced what has heretofore been either a spirit of confrontation or a spirit merely of ignoring that particular branch of this government.

I, of course, believe in encouraging a spirit of cooperation, but cooperation bound on principles. That is why, then, my written testimony opens to you by avowing what, indeed, motivates me in this endeavor. And those are the principles as they were set forth by Abraham Lincoln in his discussion of the Reverend Doctor Ross.

When people say to me that I should abide by the judgment of tribal chieftains and councils as to the conditions affecting Indians, my response is the same as Lincoln's in the tale of Doctor Ross; namely, as you know, and you have it before you, that I do not think I will get that way—that perfect impartiality which is otherwise considered the most favorable to correct decisions. And I believe this Commission, and I as the Commissioner, are charged to seek as perfect impartiality as may be.

I thank you and would be happy to respond to your questions.

[Prepared statement of Mr. Allen appears in appendix.]

The CHAIRMAN. I thank you very much, Mr. Chairman.

When did you first meet Mr. Goodfield?

Mr. ALLEN. Mr. Goodfield and I met for the first time in late May 1988. He arrived at my hotel in Paris, to be precise, for the purpose of a meeting.

The CHAIRMAN. Was Mr. Goodfield ever an employee of your Commission?

Mr. ALLEN. No; Mr. Goodfield was under contract for our Commission in the period from early to mid June to early August 1988, exclusively.

The CHAIRMAN. What were the terms of the contract? Was he paid for his services?

Mr. ALLEN. I will ask our solicitor to tell you that, because I can only do so colloquially.

Mr. GILLERS. In the documents that you have been provided, Senator, is a purchase order which sets forth the terms of the contract between the Commission and——

The CHAIRMAN. Will you just describe that?

Mr. GILLERS. Perhaps I should best read from it. I should say that there were two purchase orders that were prepared. The first one was cancelled.

I'll read now from the second one, which was——

The CHAIRMAN. Was he under contract on February 7?

Mr. GILLERS. No; he was not.

The CHAIRMAN. When was his contract terminated?

Mr. GILLERS. I believe the date was August 1, 1988.

The CHAIRMAN. Was he paid for his services?

Mr. GILLERS. Yes, he was.

The CHAIRMAN. And what was the nature of his service?

Mr. GILLERS. The purchase order stated as follows:

Contractor shall perform the following task to assist the staff of the U.S. Commission on Civil Rights in preparations for a July 7, 1988, hearing on enforcement of the Indian Civil Rights Act and the civil rights of Native Americans:

One: Contractor shall prepare a briefing paper setting forth the facts in connection with the Pitts child custody case. Factors to be included in this work product are: a detailed description of events and an analysis of the psychological effects upon the parties involved. This deliverable is to be submitted in final written form to the below-designated project officer by July 27, 1988.

Two: Contractor shall assist Commission staff in interviewing witnesses concerning other child custody cases and in preparing those witnesses for the hearing. These tasks shall be performed during the period June 27, 1988, to July 7, 1988.

Three: Contractor shall attend a hearing to be held in Flagstaff, Arizona, on July 7, 1988, and shall provide assistance in hearing follow-up activities during the period July 7, 1988, to August 1, 1988.

And then there are requirements under that which are brief:

The period of performance is from June 10, 1988, to August 1, 1988.

Project officer: The Commission designates Ms. Susan J. Prado, acting staff director, to serve as project officer to provide technical guidance in the performance of this work and to certify the acceptance of work products."

And then there is a clause on the rights and data.

The following Federal acquisition regulation applies: "Under no circumstances can the contractor duplicate, utilize, or market materials produced under this order without the express permission of the contracting officer."

The CHAIRMAN. Was he paid for this service?

Mr. GILLERS. He was paid. The terms of how payment will be made are in the purchase order, and he was paid. I believe payment was made in February 1989, for the services rendered under this contract.

The CHAIRMAN. When was that?

Mr. GILLERS. The actual payment?

The CHAIRMAN. The date.

Mr. GILLERS. The date? Well, the work product was accepted by Susan Prado as project officer on November 29, 1988. The paperwork was submitted to the Commission's payment officer, which is the Department of Agriculture National Finance Center, on November 29, 1988, by Mary K. Mathews, the deputy staff director for management. I believe the payment was made in February of 1989, but I do not have the exact date.

The CHAIRMAN. At the end or the beginning?

Mr. GILLERS. Pardon?

The CHAIRMAN. Was it in the beginning of February?

Mr. GILLERS. There is a note here from one of the budget staff per my conversation on February 10, 1989 with Barry Goodfield. He received his check for $5,200 on approximately February 1, 1989. It is signed Joyce Gresham on February 10, 1989.

The CHAIRMAN. Mr. Chairman, how long have you been a member of the Commission?

Mr. ALLEN. I joined the Commission in April 1987.

The CHAIRMAN. And I presume you have a legal staff that you can refer to at times?

Mr. ALLEN. Indeed.

The CHAIRMAN. How many lawyers do you have on your staff?

Mr. ALLEN. I can't give you a precise count on that.

The CHAIRMAN. Just a round number.

Mr. ALLEN. We certainly have at least one-half dozen. I'm told roughly 1 dozen.

The CHAIRMAN. About 1 dozen? When did you first acquaint yourself with this *Desrocher* case?

Mr. ALLEN. The first information I received on this case was in a briefing—a memorandum preparatory to a subcommittee meeting held, I believe, on June 28, 1988.

The CHAIRMAN. Does your legal staff brief you on this?

Mr. ALLEN. Brief me? Not in the sense of any meeting. I happened to be in Montreal at that time, and I received an express package containing Dr. Goodfield's memorandum in which he discussed the *Desrocher* case. We held a conference call by telephone with legal staff in which we discussed the case.

The CHAIRMAN. Did your staff tell you about the Texas adoption?

Mr. ALLEN. Did my staff tell me about it? No, not in the terms of that particular meeting, that I recall. If it was mentioned, it may have been mentioned in passing.

The CHAIRMAN. Were you aware of——

Mr. ALLEN. But it was certainly included in the summary in the Goodfield memorandum to which I referred.

The CHAIRMAN. Did the Goodfield memorandum tell you that the Pima County Superior Court had ruled that the Texas adoption was illegal and fraudulent?

Mr. ALLEN. I could consult it to ask you. I assume that it was there or elsewhere, but I have heard that. Yes. It is correct that I have heard that.

The CHAIRMAN. When did you hear about it?

Mr. ALLEN. That the Pima County court had overturned the adoption? I can't tell you the precise date in which I first heard about it. I'm going to assume I heard about it in that conversation.

The CHAIRMAN. Were you concerned that the adoption was illegal?

Mr. ALLEN. I'm not quite certain of the thrust of your question, Senator. If I heard that it had been overturned, my assumption would be that the court had judged it to be illegal.

The CHAIRMAN. Do you have Ms. Stella Duran on your staff?

Mr. ALLEN. Yes; Ms. Duran is on my staff.

The CHAIRMAN. Is she the executive assistant to the chairman of the Commission?

Mr. ALLEN. She is the assistant to the chairman, yes. Perhaps it is the title of executive assistant. I don't know if that is correct. Yes.

The CHAIRMAN. Did you instruct her to call the deputy director of the U.S. Marshal Service to request the services of U.S. marshals?

Mr. ALLEN. No; I absolutely did not. Permit me to go on and say to you that I happen to be in Washington, and that office is in California, of course. When I telephoned her for messages and was informed that she was doing that, then I ordered her in categorical

terms to undo what she had done and to have nothing to do with U.S. marshals.

She related to me at the time that she had been told to do that by Mr. Goodfield, and I said to her, still in categorical terms, Mr. Goodfield does not order this office.

The CHAIRMAN. Did she rescind the order, as instructed by you?

Mr. ALLEN. That was what I was given to understand by her verbally, as well as in her recorded log book. I ask my staff to keep personal logs precisely so that such things can be checked. Her personal regard had it noted "cancelled" on the date I spoke to her and told her to cancel it.

The CHAIRMAN. Did you ever call the Phoenix office of the United States Marshal?

Mr. ALLEN. Did I ever call the office at any time in my life?

The CHAIRMAN. No, no. For this trip.

Mr. ALLEN. At that point in time no, I did not.

The CHAIRMAN. On February 3 did you call and leave a message indicating that protective services might not be needed?

Mr. ALLEN. Did I personally call and leave such a message?

The CHAIRMAN. Yes.

Mr. ALLEN. To my recollection, no.

The CHAIRMAN. When you arrived in Phoenix were you greeted by the U.S. marshals?

Mr. ALLEN. No; I was not.

The CHAIRMAN. When did they join you, sir?

Mr. ALLEN. They joined me after several hours' trip up the highway, accompanied with Mr. Goodfield and his two assistants—one of whom was his son—and, indeed, followed by a van that contained a documentary news crew from NBC News.

At some point—and I wish I could pinpoint it for you, but frankly I'm not conversant with the geography sufficiently—we stopped at an appointed rendezvous and they were there.

The CHAIRMAN. You had a rendezvous pre-arranged with Mr. Goodfield?

Mr. ALLEN. I had a rendezvous arranged with Mr. Goodfield in Phoenix. That is to say, he was given my arrival schedule by Ms. Duran. He met my airplane.

The CHAIRMAN. So you were going together into White Mountain Apache?

Mr. ALLEN. Yes; there has never been any doubt about that.

The CHAIRMAN. And how many cars were in this motorcade of yours?

Mr. ALLEN. As my submitted testimony indicates, the number is three vehicles.

The CHAIRMAN. And were you riding with the U.S. marshals?

Mr. ALLEN. Once I met them at the site of the rendezvous, and once I requested them to provide introduction to me on the basis of their description of their experiences on the reservation, yes, I rode onto the reservation in their automobile.

The CHAIRMAN. Didn't you at that time tell them that their services were not needed?

Mr. ALLEN. No; I did not tell them that their services were not needed apart from what I have described to you; namely, I request-

ed them to provide an introduction to the parties whom they seemed to know.

The CHAIRMAN. And yet you strongly told Ms. Duran you didn't want their services?

Mr. ALLEN. And?

The CHAIRMAN. And when you saw them you accepted their services?

Mr. ALLEN. Well, you know, I don't quite know how to explain this to you, but in the course of the ordinary development of human events things change. One is exposed to circumstances that introduce new reflections and new possibilities. One is ever passing over in one's mind the opportunity to exercise judgment. The judgment should always reflect the accumulated experience in wisdom that one disposes at the moment.

When I met them at that point of rendezvous and they explained to me circumstances known to them on the reservation and persons known to them I, indeed, did say to them, "Would you kindly give me the introduction?"

The CHAIRMAN. Introduction to whom?

Mr. ALLEN. The first and foremost would have been, of course, the principal at the school.

The CHAIRMAN. Who accompanied you on this trip?

Mr. ALLEN. Altogether?

The CHAIRMAN. No; I'm talking about your office. Anyone from your office?

Mr. ALLEN. No one from my office accompanied me.

The CHAIRMAN. You were there by yourself?

Mr. ALLEN. That is correct.

The CHAIRMAN. Were you there in your capacity as chairman of this Commission?

Mr. ALLEN. I was there as a member of this Commission. My capacity as chairman only involves my setting an agenda and presiding over meetings.

The CHAIRMAN. Did you instruct Ms. Duran to tell the U.S. marshal that you were going to Arizona for the purpose of taking a deposition on the White Mountain Apache Indian Reservation?

Mr. ALLEN. I gave Ms. Duran absolutely not instruction relative to U.S. marshals apart from the categorical instructions not to request marshal service.

The CHAIRMAN. You went to the reservation in your capacity as chairman of the commission, and what was the purpose of your visit, sir?

Mr. ALLEN. The purpose of my visit was, indeed, to assess—and I emphasize the word "assess"—whether, at the end of the process that involved the case of Lalita Altaha, there might have been some perfection of a process which seemed to me fatally flawed in terms of its fairness at the outset.

The process was at its end now, and the process I was concerned with, as I have elaborated in my written testimony, was whether there was any indication at all that the best interests of the child were, at least in watchword, in the process. One indication of that indirectly could, indeed, be that the child's wishes were considered—and I emphasize "considered." So I went to ask if her wishes were considered, in appropriate language, of course.

The CHAIRMAN. Before entering the reservation did you call the chairman of the council or chief of the police or any White Mountain Apache——

Mr. ALLEN. Absolutely not.

The CHAIRMAN. Upon entering the school ground did you call upon the principal or any authorized official of that school?

Mr. ALLEN. As I think your records will show, I entered three school grounds and contacted principals initially at each.

The CHAIRMAN. At the school where Ms. Lalita was attending did you see the principal?

Mr. ALLEN. Absolutely.

The CHAIRMAN. When did this happen?

Mr. ALLEN. When I arrived at his school.

The CHAIRMAN. And did you ask his permission to interview or to take her off the grounds?

Mr. ALLEN. Once I was introduced to the principal, the next statement was to ask the principal to introduce me to Lalita. The principal at Lalita's school responded by looking at his watch and saying "Come quickly," and dashing to a doorway. At the doorway he pointed to a bus departing school grounds and said, "Sorry, she's on that bus."

The CHAIRMAN. And what did you do, sir?

Mr. ALLEN. He then proceeded to say—well, my initial reaction was to say, "Well, that's too bad." He then proceeded to explain that the bus would stop at the school at which we had stopped previously and where we had talked to a principal—the high school, I believe it is, in this case. He said if we went to that high school we could perhaps see her. So we proceeded to our cars and went to that high school.

The CHAIRMAN. Did you ask anyone's permission to take Ms. Lalita off the school grounds?

Mr. ALLEN. I never sought permission to take here, and never had occasion to seek permission to take her off the school ground, never intending to nor ever taking her off the school ground.

The CHAIRMAN. Was she taken off the school ground?

Mr. ALLEN. She was.

The CHAIRMAN. In your presence?

Mr. ALLEN. You mean did I witness it? Yes, I witnessed it.

The CHAIRMAN. And when you did so, you had United States marshals with you?

Mr. ALLEN. They witnessed it, as well.

The CHAIRMAN. They were there to serve you?

Mr. ALLEN. They were there to have given me an introduction, which was initially thought to be the end of their service. And, indeed, they were not at my side as these events transpired; they were at some distance removed. Subsequently, I sought them out, therefore, and asked them for further service.

The CHAIRMAN. Did you, as an officer of the United States Government instruct the deputy U.S. marshals to stop this endeavor on the part of Mr. Goodfield to take the child out of the school grounds?

Mr. ALLEN. I am not, of course, in a position to instruct the marshals, as you know. I did, indeed, request the marshals to make certain that the law not be broken. I, indeed, was in an awkward posi-

tion where I had suspicions to which they were not privy in the sense that they did not hear the exchanges, and the visible evidence of what transpired was not, from their perspective, inculpatory. Nevertheless, I made clear to them that I thought there was a danger pending and that they had at least to make certain, from whatever they would take as appropriate evidence, that it not occur.

The CHAIRMAN. When the child was apparently picked up by Mr. Goodfield, where were you?

Mr. ALLEN. I was with the marshals.

The CHAIRMAN. You were with the marshals?

Mr. ALLEN. Yes.

The CHAIRMAN. In another car?

Mr. ALLEN. We were not in the car at the moment the child actually entered Mr. Goodfield's car—and she did enter freely, which is what complicated the marshals' situation, as you can imagine.

We were standing at that moment, and I'd say we were at least 75 yards away witnessing it, at which time, not being able to give them something more solid, I left them and went to the Goodfield car before it exited the property and remonstrated with Mr. Goodfield in no uncertain terms.

The CHAIRMAN. And then what happened?

Mr. ALLEN. Then he drove away, nevertheless, and I returned to the marshals and I said to them, as I have related, he may not permit him to leave the reservation with that child.

The CHAIRMAN. And where did you go from there?

Mr. ALLEN. We then drove out in the marshals' car following Dr. Goodfield. And, knowing that we were in the route to Lalita's home, which was known to the marshals, we then remained in the pursuit of that automobile until such point as it would, in fact, pass that critical turn-off to Lalita's home, the judgment being that if it did that they would then have concrete evidence upon which to act.

The CHAIRMAN. Did the Goodfield car cross this critical point and leave the reservation?

Mr. ALLEN. No; it did not. It stopped before approaching the turn-off to Lalita's home. Mr. Goodfield left his car. We stopped behind him. He came back. He addressed us—and me, in particular—and said, "We're going to take Lalita home." He then asked me to join the car so that I could see that for myself, and then related further that he wanted me to hear a story that Lalita was telling him.

So I joined the car. We proceeded then. And in the course of approaching Lalita's home, before we reached the turn-off, we were then—I'm sure it was at that point—overtaken by Lalita's mother in the sense that her pick-up truck passed us in the roadway and entered the turn-off to her home before we did. We entered immediately after her.

The CHAIRMAN. And you were in the car with Mr. Goodfield and Lalita?

Mr. ALLEN. At that point.

The CHAIRMAN. And after that what happened?

Mr. ALLEN. We arrived. We stopped behind Mrs. Altaha's pick-up truck, spoke briefly to Mrs. Altaha. She evinced no disposition for

conversation. And I said, "Let us then depart," leaving Lalita with her.

The CHAIRMAN. Did you leave Lalita there?

Mr. ALLEN. Yes; we left Lalita there, to be sure.

The CHAIRMAN. Would you have taken a child out of a D.C. school ground without conferring with the principal or the parents?

Mr. ALLEN. Would I? No. Absolutely not.

The CHAIRMAN. Why would you not?

Mr. ALLEN. I would consider it inappropriate. My experience, as well as ordinary common sense, suggests to me that that is inappropriate.

The CHAIRMAN. Did you know that Mr. Goodfield was, at one time, in a contract with your Commission?

Mr. ALLEN. Of course.

The CHAIRMAN. And you did not make any attempt to stop him?

Mr. ALLEN. I think you heard me say that I did. Within the limits of my powers I made a rigorous, vigorous attempt to stop him.

The CHAIRMAN. You knew this was a violation of the law?

Mr. ALLEN. No; I did not. I knew that it was unwise. I said to him—I think you've heard it repeated—that it might well be a violation of the law. But I do not hold myself out as a lawyer, and I do not purport to speak from the black letter. But I do purport to speak from a fund of common sense.

The CHAIRMAN. Senator McCain?

Senator MCCAIN. Thank you, Mr. Chairman.

Commissioner Allen, I think you were very, very badly embarrassed and misled by Dr. Goodfield, and if I were you I would assist in seeing that the proper charges were brought against him for his conduct on this occasion. I think there are some circumstances here which really are uncalled for, and I'd like to explore a couple of those.

On whose recommendation was Mr. Goodfield hired by the Commission?

Mr. ALLEN. On my recommendation, Senator.

Senator MCCAIN. And why did you do that?

Mr. ALLEN. Because Mr. Goodfield had been introduced to me by the people involved in the *Pitts-Keetso* case, who were Mr. and Mrs. Pitts and Patricia Keetso, herself, regarding her child, Allyssa. They had come to rely implicitly upon him and established strongly in my mind his advantageous position for permitting us to organize on a very short-term basis the hearing we wished to conduct into the ICWA enforcement as it particulary affected the *Pitts-Keetso* case.

Their presentation was compelling. It remains compelling. I didn't take it simply at their word; I took it on the basis of further conversations initially with my assistant at the time who interviewed them before I spoke to them, who interviewed Dr. Goodfield many times before I spoke to him, and then finally upon interviewing him, himself.

Senator MCCAIN. Did you know when you went on the reservation that Dr. Goodfield was representing the Desrochers?

Mr. ALLEN. No, I did not know he was representing the Desrochers at any time. I only knew that he had been under contract to the Commission and was subsequently yet involved. And it seemed, by the way, if I may say, perfectly normal, given what he had done in the *Pitts-Keetso* case, because the reason that they introduced me to him was that he became involved in their case voluntarily and on his own. It seemed perfectly consistent with his modus operandi, if I may say so, that he would be further involved with the Desrochers.

Senator MCCAIN. You had on several occasions discussed this specific case with him before you went on the reservation?

Mr. ALLEN. On several occasions—I think I had three or four occasions.

Senator MCCAIN. At no time did he tell you that he had represented the Desrochers?

Mr. ALLEN. No, he did not.

Senator MCCAIN. Do you think that's proper?

Mr. ALLEN. That's a tough call, Senator.

Senator MCCAIN. What?

Mr. ALLEN. That's a tough call.

Senator MCCAIN. How——

Mr. ALLEN. I don't know when he became a representative of the Desrochers relative to the conversations he and I had.

Senator MCCAIN. How is it——

Mr. ALLEN. He didn't reveal this to me until that day of the 7th. When it happened—if I knew that it happened at some point well before the earlier conversations, I would say he probably should have told me that. Yes.

Senator MCCAIN. I don't know how it is a tough call when this individual steers you to a certain family with a clear bias because he is being paid by the foster parents. It seems to me that if you had known that, clearly he could not give you and the Commission an objective view of the events.

Mr. ALLEN. My response was not that he couldn't or could be objective, it was that I do not know when he entered their service relative to——

Senator MCCAIN. And I'm telling you——

Mr. ALLEN [continuing]. The conversation.

Senator MCCAIN [continuing]. What is proper for him—I'm asking you again: is it proper for him to be working in this fashion and not tell you that he was representing the foster parents?

Mr. ALLEN. If that were, in fact, the case, yes.

Senator MCCAIN. Isn't it the case?

Mr. ALLEN. As I say, I do not know when he entered their service.

Senator MCCAIN. Do you know now that he was representing the foster parents?

Mr. ALLEN. He revealed that to me on the 7th. He did not reveal to me when it began.

Senator MCCAIN. Is it clear to you now that he was representing the parents on the 7th?

Mr. ALLEN. Yes. Yes.

Senator MCCAIN. Now do you think it was proper?

Mr. ALLEN. That he should represent them, or that he should not tell me?

Senator MCCAIN. That he should not tell you, Commissioner.

Mr. ALLEN. Well, certainly it is not proper that he should not tell me. But, in November——

Senator MCCAIN. That was the thrust of my question, and I wish you had said that to start with. That was my initial question, Commissioner, and I think it is highly improper. I think it is incredibly unsavory that this person, who is taking money from the foster parents, has a clear agenda of his own which he then displayed by putting the child in the car with him and, from the film we saw, had intention of removing the child from the reservation. He was manipulating you in an incredible fashion.

I think it is well to point out here that Mr. Goodfield could not have entered that reservation and carried out the actions which he did without your presence there. I think that is an important point here. It would have been—the principal of the school was not going to allow Mr. Goodfield to come to the school and interview that child, but obviously, because of your position, which you identified yourself as with your identification badge, clearly they would allow you to.

So Mr. Goodfield manipulated you in an incredible fashion to carry out the agenda of the foster parents who wanted the child back despite the fact that court orders—judgment had been rendered by the justice system in this country that they had absolutely no right to do so. In fact, they were prohibited from having any communication with the girl, whatsoever.

Mr. ALLEN. That's correct.

Senator MCCAIN. So they were able to not only violate the spirit of that court order, but he was able to manipulate you by achieving this kind of access to this young woman that he otherwise never possibly could have achieved. If I were you, Commissioner, I would be outraged at what has happened here in this scenario.

I notice you greet that with some amusement. Frankly, the only thing that we have in this world that we take with us when we leave is our reputation. And because of this action, it has harmed your reputation—certainly with Native Americans in this country who I'm convinced that you are committed to trying to help. Do you have any response to that?

Mr. ALLEN. Yes, I do, Senator. I may say I sometimes boil quietly. I have an advantage in not blushing physically or flying into rage visibly. People can't always discern from my speech precisely the intensity of my feeling. But I generally make quite clear where I stand on things.

And I want to make sure that before we arrived at that reservation I made quite clear what I expected to happen, and I had the consent of that news group which happened to be there. I had the consent of Mr. Goodfield and others that this would be conducted privately only if, indeed, the principal gave us the introduction. It would be within the school room. There would be no cameras in the school room or the office where I might meet the child. In short, there would not have been occasion for Mr. Goodfield to do what Mr. Goodfield did.

I don't think it quite fair to say that he manipulated me. I do think it fair to say he took advantage of the situation. I do think it fair to say I should be outraged that he took advantage of the situation. And I think it would be fair to say I have been outraged by that. And I think I showed it immediately rather than after the fact.

I just want to make very clear, though, that it couldn't have happened but for that really rather bizarre set of circumstances that brought this child onto the sidewalk outside that school bus. And it was visible almost immediately when I couldn't find the entrance into that school room and get them to go inside, as I tried to do at that moment.

Yes, these things were unfortunate. They should not have happened. But I cannot believe that my reputation will fall by the standards of my conduct in that emergency situation. I have to believe that any fair-minded critic will agree with the judge, who looked at a very biased tape, I understand, and nevertheless could see that I responded with responsibility.

Senator MCCAIN. I guess it is not up to me to make a total judgment until we have all the evidence, Commissioner, but I agree with the judge, also, that at a certain point in this scenario you acted responsibly in preventing Mr. Goodfield from removing the child from the premises. But the events that lead up to such a situation evolving, in my view, is a case of misjudgment combined with manipulation.

And on the subject of the film crews, you stated just then and in your written statement that the interviews were going to be conducted privately; is that correct?

Mr. ALLEN. That's correct.

Senator MCCAIN. But yet you interviewed the young woman in the presence of two film crews.

Mr. ALLEN. Again, those interviews unfolded in a circumstance which was not planned. What was planned was quite different. And it is not unlike the circumstance in which you earlier said Mr. Goodfield would not have gone had I not been there.

My understanding was that he was going, and I decided to go because he was going and because I was somewhat fearful of what might transpire. Whether he would have gotten access to the child I don't know. But I do know that his going was not based on my decision to do; it was, rather, the reverse.

Senator MCCAIN. But, Commissioner, your presence with Mr. Goodfield lent credibility to him and gave him access that he otherwise would have never received. I can assure you that that's the case. We could recall the chairman of the committee to testify to that fact, because I have been told it.

But, again, I would like to say that I am not unfamiliar, nor is the chairman, certainly, with the media. If I had told the media that I did not want an interview televised and I saw them begin to, I would stop the interview, tell the cameras to turn off, and then continue the interview. In your case, after stating that the interview would be taken in private, you allowed the interview to continue with not one, but two film crews filming the interview with the young lady. Frankly, I don't understand that either, clearly given the incredible sensitivity involved in this situation.

I guess it is an aside, but to take a young lady and show her a picture of her dog and then not expect an emotional reaction I think is incredible, and I think it was clear that the reason why Mr. Goodfield showed her that picture was to evoke the emotional response because he knew that the film cameras were there, and we saw how emotional the young lady got.

But I guess my question is: Why didn't you tell the cameras to shut down?

Mr. ALLEN. At that moment I was far more concerned with Lalita. I didn't even notice the cameras particularly at that moment in time, to be perfectly candid with you. You speak of experience with the express, and I'm sure you have extensive experience. I have a modest amount. I do not have an overriding consciousness of their existence. I did not look for them at that moment. I did not wait for them at that moment. And, indeed—bear in mind, Lalita descended the bus to be greeted not by me with an identification card, but by Mr. Goodfield with a photograph. It is rather the reverse of what one might otherwise expect in the circumstance.

The introduction wasn't needed at that moment. What was needed was a sober head standing by, and I'm pleased there was one.

Senator MCCAIN. Let me ask—and I apologize, Mr. Chairman, for taking so much time.

The CHAIRMAN. No, no, no.

Senator MCCAIN. Why was a national television crew necessary for this whole scenario to take place anyway? Why was it felt necessary that there had to be a national television crew along in a situation which is obviously fraught with incredible emotion and, it seems to me, increase the danger of inflicting further emotional damage on the person that we are purporting to try to ensure that her rights are being protected?

Mr. ALLEN. The television crew was necessary for reasons that the television crew would have to explain. They communicated with Doctor Goodfield about that, not with me. I know that they were making a documentary. They were not making a national news program—that was rather a secondary or a fall-out affect of it all.

I assume that documentary is yet to come—the documentary on primarily apparently the Indian Child Welfare Act and many other issues affecting Indians that this committee is well versed in.

I suppose you would say they decided this would be good for them to pull together whatever account they're pulling together. I would not know the answer to that.

Senator MCCAIN. I guess we have a difference of opinion as to what your role could have been, because if I had been in your place and I had seen the film crew I would have said that it was inappropriate. I will admit that the media is incredibly intrusive from time to time, but I have never been forced to have a member of the media accompanying me on any official situation, and I don't think it was—I think that you should have, when you saw them, noted that it was inappropriate for them to be accompanying you, given the impact that this could have had on the young lady.

Well, I guess there are a lot of other questions, Mr. Chairman, that need to be answered here. I hope that the young lady recovers. I understand that she is receiving counselling, according to testimony, from the tribe.

The sad aspect of this is that we deal on a level of policy in one respect and then, of course, we have a tendency from time to time to neglect the impact on individuals, and this young lady I think was subject to an experience which was absolutely needless, and one that I can only hope that she can recover from with the help of her family and her tribal members.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, sir.

Were you here listening to the testimony of the first panel?

Mr. ALLEN. I heard much of it, sir.

The CHAIRMAN. Chief Kane, the chief of police of the White Mountain Apache Tribe, testified that Deputy U.S. Marshal Morris instructed the principal of the school not to call anyone for 30 minutes. Were you aware of this?

Mr. ALLEN. Yes, I was aware that he had given that instruction. Yes. I have heard that related before.

The CHAIRMAN. Did you advise Mr. Morris to tell the principal that?

Mr. ALLEN. No; I did not.

The CHAIRMAN. Was Mr. Morris, at that moment, in your service?

Mr. ALLEN. Was he in my service? I'm not sure——

The CHAIRMAN. Were they there just on their own, or were they there to serve you?

Mr. ALLEN. Let me say this, by the way. I say that I know that it was done. I don't know that Mr. Morris and not Mr. Skaggs did it. One of the two of them did it; I don't know which. I don't know what inspiration they had that moved them to do it. I think you would have to ask them if you want the answer to that question. I can't answer for them.

The CHAIRMAN. Were you there when this instruction was given?

Mr. ALLEN. Yes; to be sure.

The CHAIRMAN. Did you countermand it? You didn't think it was inappropriate?

Mr. ALLEN. Not particularly. As I recall, Senator, we had been given some information as to where to go and we were leaving the building. If the marshal turned while we were leaving and gave such an instruction, it may be that I thought about it as odd, but it certainly didn't deter me in terms of the mission I had undertaken. I continued my progress at that point.

The CHAIRMAN. Why do you think that the marshal gave that instruction?

Mr. ALLEN. I don't put words in other people's mouths or thoughts in their minds.

The CHAIRMAN. You said that it was rather odd. Why do you think it was rather odd?

Mr. ALLEN. It may have struck me as rather odd.

The CHAIRMAN. Why?

Mr. ALLEN. I would not have contemplated such an instruction. It would have come out of the blue. Odd in the sense of wonderment.

The CHAIRMAN. You indicated that one of the reasons you went to Arizona to the reservation was because of your concern with Mr. Goodfield's intention; isn't that correct? That was one of your reasons for going to this reservation?

Mr. ALLEN. Yes; I was apprehensive about it.

The CHAIRMAN. Can you tell us why this concern?

Mr. ALLEN. Certainly. I think that's fairly straightforward. Mr. Goodfield had been under contract to the Commission. It was a contract which had long since expired. Nevertheless, there was the prospect that his having become involved with these people through a Commission contract could be seen as continuing and extending Commission involvement in whatever he was doing. I thought that was grounds for concern.

I additional had, at that point, by that time, heard enough in the way of reservations about his conduct to think that there was at least some responsibility left on my part for having introduced him into the lives of these people to at least see that that conduct was limited in its potential for damage.

The CHAIRMAN. You were concerned that he might conduct himself improperly or illegally?

Mr. ALLEN. I was concerned that something may result from his conduct which I would judge to be inappropriate.

The CHAIRMAN. That something might result from his—

Mr. ALLEN. Might. Yes. That's a possibility, not a probability.

The CHAIRMAN. What is that something?

Mr. ALLEN. I don't know. Something is a general, as in the use of the indefinite article "a" or "an."

The CHAIRMAN. If that is the case, sir, why did you not notify the chief of police?

Mr. ALLEN. I didn't expect criminal activity.

The CHAIRMAN. Yet you were concerned about improper conduct.

Mr. ALLEN. Proper that I might judge inappropriate. I am not a law enforcement officer.

The CHAIRMAN. Do you really believe that the Congress has created a racist scaffolding within which it imprisons Indians?

Mr. ALLEN. Absolutely. Would you like me to elaborate?

The CHAIRMAN. No; your letter to Mr. Yamel does that. I just wanted to know if you really meant that.

Mr. ALLEN. Oh yes.

The CHAIRMAN. Do you think the Indians feel the same way?

Mr. ALLEN. I do not put words in other people's mouths or thoughts in their minds. I have heard some Indians speak of it so; I have heard some speak of it otherwise. I have not taken a vote.

The CHAIRMAN. So it is your testimony that you do not believe that what you have done is—nothing that you have done would be construed by you to be improper——

Mr. ALLEN. That is correct.

The CHAIRMAN [continuing]. Or unwise?

Mr. ALLEN. I am an ordinary mortal. I am impressed with fallibility in human beings, and I know I am as given to it as any other

human being is, but I do not believe on this particular occasion that my conduct has been a notable example of that fallibility.

The CHAIRMAN. When you met Doctor Goodfield were you there to do business on the Desrocher case?

Mr. ALLEN. No; when I met Dr. Goodfield in Paris in May it was specifically to talk to him about his involvement in the *Pitts-Keetso* case and whether he had the kinds of contacts that would permit us to establish a satisfactory witness list in that case.

The CHAIRMAN. And when you got to Phoenix and were preparing to enter the reservation your only purpose was to monitor the activities of Mr. Goodfield?

Mr. ALLEN. No. That was not my only purpose. Had it been that alone I doubtless would not have done it. Had either of my purposes operated and existed singly I doubtless would not have done it. But in combination it made them persuasive.

The CHAIRMAN. You were there to look into the *Desrocher* case?

Mr. ALLEN. To look into the situation of Lalita Altaha with respect to that single and important question: whether, indeed, anyone had troubled to ask her where she wished to live.

The CHAIRMAN. And the only preparation you made for this was a brief or memo that was submitted by your legal staff?

Mr. ALLEN. I am not quite certain what you mean by "only preparation." Permit me to summarize my preparation.

Long before we raised directly the question of the Indian Child Welfare Act in the context of our subcommittee I had become aware of the developing facts in the *Choctaw* case. This is a case which ripened finally only a few weeks ago at the Supreme Court of the United States.

The CHAIRMAN. I am talking about Ms. Altaha. Were you briefed on her?

Mr. ALLEN. Yes; what I'm saying is: my concern with the ICWA brought to my attention many cases in the fullness of time, among which was this case. This case highlighted a single question of procedure in which I was interested. I was sufficiently aware, and that awareness had become sufficiently mature to be able to expect to make a judgment about procedures in this case with a single question.

The CHAIRMAN. Well, I thank you very much.

May I now call upon Commissioner Destro.

Mr. ALLEN. Thank you.

STATEMENT OF COMMISSIONER ROBERT DESTRO, U.S. COMMISSION ON CIVIL RIGHTS AND MEMBER OF THE SUBCOMMITTEE ON INDIAN CIVIL RIGHTS, WASHINGTON, DC, ACCOMPANIED BY WILLIAM H. GILLERS, SOLICITOR; WILLIAM J. HOWARD, GENERAL COUNSEL; MELVIN L. JENKINS, ACTING STAFF DIRECTOR; JOHN C. EASTMAN, DIRECTOR, CONGRESSIONAL AND PUBLIC AFFAIRS

Mr. DESTRO. Thank you, Mr. Chairman.

I apologize for the lateness with which you received my printed statement. I must confess that I approached coming here today with a bit of ambivalence because even as I sit here and listen

today I find myself growing not only angry but weary of the chairman's explanations.

I am here today purely to represent my own views. The Commission has taken its position with respect to the White Mountain Apache Nation, and I won't repeat it here.

The reason I did come here today is to explain, at least from my own point of view, the negative impact I think that the chairman's activities have had on the ongoing ICRA project of the Commission.

I have been working on that project for better than three years now. Unlike the chairman, I have attended all the hearings, reviewed many of the relevant documents, and had done a considerable amount of research and talking with people in the field.

What I hear today and what I have read of what the chairman has done concerns me and it profoundly disappoints me because a lot of hard work and a lot of hand-holding has gone into trying to assure people who live in all those far-flung communities we know as Indian Country that we were not out to do a job on Indian tribal sovereignty.

So as I listen today, and as I say in my printed statement, the issue today really isn't either tribal sovereignty or the Indian Civil Rights Act. It really is a question of whether or not there is responsibility in the case of a breach of trust.

We have heard Senator McCain talk about the interest of individuals when policy questions are at stake. We have heard the chairman, in his opening statement, talk about how Lalita Altaha could represent all Indian children. I think, Senator, that that's the problem here.

One of the reasons that I was so ambivalent—and I've said this in the press and I said it at the Commission and I'll say it again here—is that I know only too well the fear that adoptive parents feel because I am one. I find it very, very difficult to intellectualize what has gone on here. We have, in truth, a tragedy of a family which has been exacerbated by a very severe breech of trust on the part of my chairman.

I have never liked it from the beginning. We heard about it afterwards. And I have to confess that even at that time I was equally as outraged as I am today.

So what I come here today to talk about, though, is that we should not allow this unfortunate incident to detract from the importance of what the Commission is trying to do here.

The theme of the comments that have been made to me in Indian Country, the theme that has been consistently underscored by most of the witnesses in all of the hearings that we have been at is that, while there are problems in Indian Country, just like there are problems in other States and cities, the governmental systems are young, they are underfunded, and, in many instances, undertrained and inexperienced. And that from the Commission, those who are trying to bolster local self government in Indian Country, they need help and understanding, not, in my view, what happened here, which was interference.

The issue of sovereignty and civil rights which make our work on the ICRA project so difficult is that once one gets into it, one begins to see, if one looks carefully, that there have been failures at all levels—at the Federal level, at the tribal level, at the State

level, and at the local level. State and local governments simply, in many cases, don't take Indian tribal government seriously. Tribal governments, for their part, have all of the problems that all local governments have when they don't have enough money and training and experience. And the Federal role I need not catalog. We know what the failures of the Federal role are, and I'm very disappointed that the Commission's project has now been tainted by another breech of trust at the Federal level.

The real fear of the Indian Civil Rights Act Project has always been that it would become a device either to restructure tribal government or subject tribal affairs to plenary Federal review. My own view is that that's not a warranted position.

But this really isn't the place to discuss what we would like to get into, just as I believe very strongly that this is not the case to either defend or re-litigate the *Altaha/Desrocher custody* case. This is a very unfortunate incident. The Commission has apologized. And I want the record to be very, very clear that I disagree somewhat with Chairman Johnson when he said that the purpose of the subcommittee was to pass judgment on tribal government. In fact, it is not.

The purpose of the ICRA report is to be of assistance to the degree possible consistent with tribal sovereignty and civil rights in Indian Country. If we can do that, we will have fulfilled our statutory role to report and to make recommendations to Congress and the President which can be discussed validly on a clear record.

Beyond that, we have no right to interfere either in families or in tribal affairs or in State court decrees or anything else.

I decided finally to appear today simply to say that I'm very, very upset that all of this happened. It has immensely complicated not only my life, but the life of all the other commissioners. And it has case severe aspersions on the integrity of a report that has been ongoing and in which many, many people have contributed many hours and much sweat and toil. And at this late a date to have this kind of a stain cast on it is extremely frustrating.

So all I can say from my own perspective is that I'm sorry it happened, but I will do everything in my ability as a member of that subcommittee to assure that it is not the hatchet job that the tribes have always feared that it was going to be.

Thank you, sir.

[Prepared statement of Mr. Destro appears in appendix.]

The CHAIRMAN. Mr. Commissioner, I thank you very much. I can well understand and appreciate how difficult it must be for you to be present here this morning to testify. But, if I may, I will ask you a few questions.

In reading the materials that were provided this committee—we had requested certain material—one would get the impression that the *Lalita Altaha* case was considered by the Commission. Was it considered?

Mr. DESTRO. As I recall, Senator, we discussed the *Desrocher* case in the teleconference that took place at the end of July last year. I went back and looked at my notes, and my own strong recollection was that I argued very strenuously that we should have nothing to do with the *Desrocher* case, that it was far too complex and difficult, it did not illustrate the kinds of problems that we were trying

to look at. And when I looked for further guidance from my notes, I found that there wasn't much written, which meant largely that it reconfirmed my suspicion that I had spent more of my time talking than writing notes.

But my strong recollection is that we did talk about the case and that we agreed that we weren't going to have anything to do with it.

The CHAIRMAN. Can you tell us why?

Mr. DESTRO. That would be—I could only give you my own recollection, and I cannot promise you that that hasn't been affected by what happened later. But, as I recall, we did have information with respect to the court order. I am an attorney, and I am a law professor, and I know, as a matter of fact, that one should not second guess court decrees. Court decrees are on the record, and it is not the role of the Civil Rights Commission to involve itself in second guessing those kinds of decrees. In fact, even the ICRA Project has not undertaken to second guess Indian tribal court decrees. The whole thrust of the problem has been how the processes work, not what they came out with.

So the *Desrocher* case, in my view, from the beginning was always one that we should have had nothing to do with.

The CHAIRMAN. When did the Commission first learn of this visit to the reservation?

Mr. DESTRO. I would have to check my calendar. But I can tell you how I learned of it. It was probably around February 15, and I heard about it in a telephone call from one of my colleagues, Commissioner Francis Gast of Nashville, Tennessee. I was in a meeting with a student about an exam, and he called and said he needed to talk to me for about 5 minutes. He said he had to read me something that just came over his fax machine from the Senate Select Committee on Indian Affairs. That is how I learned about the events at Whiteriver.

The CHAIRMAN. And did the Commission, as a Commission, act upon this information?

Mr. DESTRO. Yes; we did.

The CHAIRMAN. And when was this, sir?

Mr. DESTRO. We took action I believe at the March meeting of the Commission. I had——

Mr. ALLEN. March 17.

Mr. DESTRO. The March 17 meeting of the Commission. I had communicated with the chairman by letter in early March asking him for a detailed explanation of what happened. We went into executive session, and the Commissioners were heard extensively in the executive session and then announced in public session pursuant to our rules that agreement had been reached that the chairman would apologize to the affected parties and that the Commission would send its own formal apology on the record to the parties.

The CHAIRMAN. Mr. Commissioner, do you have any views on the propriety or the impropriety of conducting an interview on public school grounds with a 14-year-old child in front of national TV camera crews without parental permission or prior notification of any authorities?

Mr. DESTRO. Senator, I have a very strong—not only a visceral reaction, but a professional one. I think it is entirely inappropriate, and have said so at the Commission meeting in much more colloquial terms which I will not repeat here.

The CHAIRMAN. Did the Commission indicate any concern about Mr. Goodfield and his activities in this area?

Mr. DESTRO. Yes, sir.

The CHAIRMAN. Were you satisfied with his performance?

Mr. DESTRO. From the beginning I think that it is fairly clear that the Commission staff had serious reservations about Mr. Goodfield's performance. To be quite honest with you, I cannot remember where I met him or if, in fact, I actually did. I know that when I did see his report I wasn't satisfied with it.

There has been extensive discussion. There was extensive discussion of the materials that have been produced pursuant to the committee's request at last month's Commission meeting, and I assume that there will be some continued discussion of some of these materials at the Commission meeting which is scheduled for later this afternoon.

None of the Commissioners are particularly satisfied with the answers we have been getting, and I think the more we find out, the less satisfied we are.

The CHAIRMAN. Well, I thank you very much. I realize the reluctance that you had in appearing before this committee, but you have performed a service and I appreciate that very much, sir.

Mr. DESTRO. Thank you, Senator.

The CHAIRMAN. Thank you, sir.

And thank you, Mr. Chairman.

Mr. ALLEN. Thank you very much.

The CHAIRMAN. Without objection, appropriate documents which have been submitted to us by the Commission will be made part of the record.

[Documents retained in committee files:]

The CHAIRMAN. Now I will call upon Mr. Peter Taylor, Senior Counsel of this committee, who was the prime investigator of this case.

STATEMENT OF PETER S. TAYLOR, SENIOR COUNSEL, SELECT COMMITTEE ON INDIAN AFFAIRS, U.S. SENATE

Mr. TAYLOR. Mr. Chairman, I am pleased to be able to sit on this side of the table as a witness for the first time in my entire career on the Select Committee on Indian Affairs.

This very unusual case broke at a time when the Senate was in full progress. We began receiving telephone reports from the White Mountain Apache Tribe regarding the incident that had occurred there the prior day, February 7. It led to the preparation of an ongoing memorandum dated February 9 that was distributed among the members of the committee to keep them apprised of events as they came to our attention.

I might say that the memorandum inadvertently came to the attention of the Civil Rights Commission or came into their possession. Apparently it was used in proceedings there and became a part of the statement that Chairman Allen submitted today.

He points out certain inaccuracies, but that's hardly surprising in light of the telephone information we were receiving at that time.

Following this incident, we received a request from the White Mountain Apache Tribe, as well as the National Congress of American Indians and other tribes, to conduct an investigation of this matter. As a result of those inquiries, Eric Eberhard, minority staff director, and I proceeded to Whiteriver, Arizona, the headquarters of the White Mountain Apache Tribe, on March 6. Eric went on to other business. I stayed in the area for the remainder of the week and interviewed a number of witnesses.

Much of what we learned has already been testified to here today and I don't think that it serves much purpose for me to simply reiterate confirmation of those details. Mainly it was a situation where Chairman Allen, Dr. Barry Goodfield, a person who had previously been a consultant with the Civil Rights Commission, an NBC film crew, and Dr. Goodfield's personal film crew all went on to the White Mountain Apache Reservation, conducted the interview with Lalita Altaha which we saw on the television this morning, the details of which have been essentially laid out in full for this committee.

In the process of our investigation, Eric and I met with a number of law enforcement officials: Chief Andrew Kane, who was here this morning and testified; Vincent Craig, the Justice Commissioner for the White Mountain Apache Tribe; Vince Hubbard, the Bureau of Indian Affairs special criminal investigator; and Doug Hopkins of the FBI.

Out of those interviews we were able to obtain the police reports that had been prepared by the Gila County Sheriff's Office in connection with the arrest of Chairman Allen, Doctor Goodfield, and the remainder of the party, and also the Arizona State Police.

We also got a report from Criminal Investigator Hubbard that I think outlines most of the events in their unfolding sequence with the police.

The initial report that came in to the police department around 4 p.m. in the afternoon led to confusion as to whether or not Lalita Altaha had been returned to her natural parents. It was almost 10 p.m. that evening before the police were able to finally ascertain that the girl was back in the possession of her natural parents. And at that point Goodfield and Allen and the party were released from police custody.

We also met with social workers at the tribe, reviewed certain social service records which are not a part of this record today and will not be. We were allowed to review these in confidence. We received testimony today with regard to the fact that certain counselling services are provided. I think that's the limit of the interest this committee should have.

We were satisfied that, in fact, these services are being performed, and I think are of great value in the transition period this young girl is going through.

I think an area of particular concern that has arisen here today involves the activities of the U.S. Marshal Service. Some of the testimony that has been provided here seems somewhat at odds with

what I learned in an interview with Marshal J.R. Skaggs in Phoenix.

I met with Marshal Skaggs for over 1 hour and discussed in some detail the activities that had transpired at White Mountain Apache. Marshall Skaggs had prepared a report, which is probably at least 6 pages in length, detailing among other things telephone calls that he had received in the Phoenix area—either he or his superior, a man named Morrisey—authorizing them to accompany Chairman Allen on the visit to Whiteriver.

They indicate further that there was communication from the headquarters of the U.S. Marshal Service here in Arlington from Deputy Director John Twomey, who I also interviewed upon return to the local area here. That led to Mr. Twomey's statement which has been made a part of the record.

In that context, we also invited the Department of Justice to allow Marshal Skaggs and Marshal Morris to appear before this committee today to discuss their role and their side of this issue.

I think what we have heard here today justifies our request, and I think it is unfortunate that they were not able to be here with us today because the Department of Justice chose not to allow them to come up.

I did prepare a 20-page summary of my investigation out there—with Eric's participation, as well as mine—looking into Dr. Goodfield when he first got into this picture, as well as the U.S. marshals and the actual physical events surrounding this whole thing.

Remaining on the marshals, I would like, if I might, just to read a few paragraphs out of my report. They were considered remarks when I wrote them down. I don't think that I would be able to improve upon them simply extemporaneously, so if I could have just 1 minute.

The CHAIRMAN. Please proceed.

Mr. TAYLOR. "Marshal Skaggs advised me that he first became acquainted with Dr. Barry Goodfield in June 1988 when he engaged in a 5-day tour of the Navajo Indian Reservation in conjunction with interviews conducted on the *Pitts-Keetso* case." A case that was referred to earlier.

In the course of their 5-day travel, they interviewed numerous people—always, by the way, with a film crew present. It appears to be Dr. Goodfield's modus operandi to bring his own film crew with him to film the interviews at the time he is taking them. In the process of this 5-day meandering in June 1988, they wound up interviewing the Desrocher family in Colorado.

I might say that at that time the whereabouts of the Desrocher family were unknown to Mrs. Altaha, to the tribe's attorney, or to any State authorities in the State of Arizona. They were in hiding at that time with Lalita living with them.

The CHAIRMAN. Was the U.S. Marshal accompanying Dr. Goodfield at that time?

Mr. TAYLOR. Yes; he was. I don't know that he was aware that the Desrochers were being looked for. In fact, I don't know if Dr. Goodfield was at the time the interview commenced. Certainly by the time he concluded it he must have known that.

Out of that interview, Dr. Goodfield apparently became employed by the Desrochers, as he has told other people and I think may be

reflected elsewhere in these records, at a fee of $1. It is obviously a voluntary service of some sort, but he took himself into a contract relationship with the Desrochers for purposes of providing expert testimony.

That was the last that Marshal Skaggs saw of Dr. Goodfield. They did apparently talk once in a while by telephone when Dr. Goodfield would be passing through Phoenix. But on December 22, 1988 Marshal Skaggs received a telephone call from Dr. Goodfield indicating that he was planning a trip onto the White Mountain Reservation and might be calling upon Marshal Skaggs for services.

Now, at this point Dr. Goodfield was no longer acting under a contract with the Civil Rights Commission, but I don't believe that fact was made known to Marshal Skaggs.

At this point I'll just read a few paragraphs.

On December 22, 1988, Marshal Skaggs received a call from Dr. Goodfield advising Skaggs that there would be a follow-up investigation by the Civil Rights Commission on a child custody case. On January 17, 1989, Commissioner William Allen called the Marshal's Office in Phoenix to discuss security arrangements.

I have a parenthetical remark: I don't know if he talked to Skaggs or his supervisor, Tom Morrisey.

On January 24, 1989, Marshal Morrisey advised Skaggs that the Marshals service would provide assistance on the proposed further investigation. This was based on instructions of Deputy Director John Twomey at the Marshals' Headquarters in Arlington, VA. This protective service was obviously arranged by Commissioner Allen. Apparently no specific date was established.

I would like to amend that sentence about obviously arranged. Commissioner Allen has testified here today with respect—his testimony was that he had made no such call to Marshals' headquarters; on the other hand, the statement of Deputy Director Twomey indicates that he had received a call from Chairman Allen's personal secretary, Ms. Duran, in California. So my sentence about having been obviously arranged by Commissioner Allen would have to be modified with respect to that testimony.

On February 3, Commissioner Allen called and left a message indicating that protective services might not be needed. Over the next 3 days, from February 3 through February 6, there were several calls from either Allen or Goodfield indicating that protective services might not be needed.

Finally they did set a date for February 7. This was based on a call from Goodfield, but it still left unclear whether any services were wanted or needed. Nevertheless, Goodfield did want to establish a rendezvous with the Marshals service, and they agreed to meet at a small store at a bridge that crossed the Salt River Canyon. Skaggs was still not sure if he was supposed to accompany the party or perform any services.

At this point Marshal Skaggs had spoken to his supervisor, Morrisey, and arranged for himself and Marshal Morris to be on duty on the White Mountain Apache Reservation for warrant duty, that is, to serve or execute two felony warrants on persons wanted in that location. Skaggs indicated that this had been arranged before he knew whether any duties were expected of him by the Civil Rights Commission.

At the appointed time on February 7, Skaggs and Morris appeared at the Salt River Canyon and made contact with Commissioner Allen, Goodfield, and party. They were informed that the party had gotten lost and wound up at Roosevelt Lake and they asked for assistance.

It was at this time that Skaggs and Morris were told that the interview was to be with an Indian girl involved in a custody battle, though it was not until that rendezvous at the Salt River Canyon that the two marshals learned of the function that they were to perform.

I would like to summarize my recollection of the discussion with J.R. Skaggs and my review of his report. We do not have his report. I requested it. He did not feel free to give it to me without clearance from higher authorities.

I think in light of my notes and the testimony we have heard here today, we will have to make some further inquiry on this point.

It is clear from the services that were performed by Skaggs and Morris that they were in the nature of a protective service. At each point where the party stopped, the two marshals went into the school systems to make the appropriate inquiries. One of the marshals asked that no call be made for at least 30 minutes. In each instance when they stopped the two marshals posted themselves in sort of an outrider position for purposes of providing protection. So the services that they did perform were certainly in the nature of protective services.

I would add to this a concern that Marshal Skaggs related to me with respect to what happened with Lalita at the school. He and Morris were posted in something of an outrider position at the time that the interview with the young girl took place. The cameras were rolling—that whole thing which we have seen here on the television.

The next thing he knew, the young girl was walking away from the school bus towards the road, and at that point he became concerned. He didn't know what was going on. Dr. Goodfield was departing. He got in his car and drove away toward the girl. The marshals got into their car, Chairman Allen got into the car with them, and apparently Dr. Goodfield stopped right up the road where the young girl was.

On the television on NBC tape we saw Chairman Allen advising Dr. Goodfield not to take the young girl off the reservation—that it would be kidnapping if he did that.

The two marshals and Chairman Allen did discuss this while they were in the car with each other. As they proceeded in route to take the young girl home, both Skaggs and Morris discussed with each other what they would do if that car passed the young girl's home base in Cedar Creek, and they were in full agreement that arrests would be made if that car did not stop.

As it turned out, the car did stop at the Altaha turn-off, so no arrests ever took place.

At the conclusion of that, the marshals went about their further business up in Show Low, AZ, and the Allen/Goodfield party proceeded down the road to Gila County, where they were located later that night.

For the most part, the remainder of our investigation I think simply confirms other details.

We did talk to both principals with respect to school policy when law enforcement officers come on the premises.

Once again, I would just like to read a short paragraph on that, and I think we will be securing affidavits on this point pursuant to your instructions.

The CHAIRMAN. The statements that were made to you, were they under oath?

Mr. TAYLOR. No; they were not.

The CHAIRMAN. Were they notarized?

Mr. TAYLOR. No.

The Chairman. None were notarized?

Mr. TAYLOR. That is correct. They were simply informal discussions to secure the knowledge. The statements of the two principals by attorney Claudeen Arthur—as I think about it, they are a summary of her notes to which she swore that it was the testimony given.

Our interview with the principals basically resulted in the same information that Claudeen Arthur has testified to; namely, that when law enforcement authorities come onto the school property, come into the school building, they go through the principals' office. They notify the principal as to what is going on. It is not uncommon for law enforcement officers to come to the school system. If a child has been into some sort of criminal problem or something else, law enforcement officers are entitled to come to the school for purposes of interviews.

It is unusual, however, for people to be coming into the school system—enforcement officials of any sort—on a civil matter. Mr. Carrington, the principal of the Alchesay High School, said that it is a general practice whenever a police officer other than a tribal officer appears to see a student, he is normally accompanied by a tribal officer. Obviously that did not take place in this case.

Carrington reaffirmed what Principal Nelson of the Whiteriver Middle School said the day before regarding discussions with kids on civil matters. He stated that "Had we known that it was a civil rights question we would not have allowed questioning without the parents being present." As it was, of course, the interview took place outside on the school grounds without any teacher present and without the consent of any school official.

I think that the remainder of this 20-page report basically tracks testimony that has otherwise been introduced here today. If there are any other questions on this, I'd be happy to try to answer them.

The CHAIRMAN. Without objection, your report will be made a part of the record.

[Report of Mr. Taylor appears in appendix.]

The CHAIRMAN. I have no further questions. I thank you very much, Mr. Taylor. As I said earlier, the staff has been instructed and authorized to receive statements in affidavit form from the appropriate witnesses that we have discussed today.

With that, the hearing stands recessed.

[Whereupon, at 12:44 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

TESTIMONY OF RENO JOHNSON, SR.
CHAIRMAN, WHITE MOUNTAIN
APACHE TRIBE, FORT APACHE
INDIAN RESERVATION, ARIZONA

May 19, 1989

My name is Reno Jonnson, Sr. I am the Chairman of the White Mountain Apache Tribe of the Fort Apache Indian Reservation in northeastern Arizona. I am pleased to be here today and on behalf of the White Mountain Apache people I want to express our heartfelt appreciation to the Senators on the Senate Select Committee on Indian Affairs for holding this hearing today. Many times, Indian Tribes and Indian people contact their congressional delegations for assistance and for various reasons. Often, assistance is not forthcoming timely. That is not true in this case. We asked for your assistance in investigating this matter and you immediately responded. For that, we are most grateful.

While you may be aware of the facts in this case, I would like to reiterate my understanding of the events surrounding the abduction of Lalita Altaha, a fourteen year old White Mountain Apache girl, on February 7, 1989.

Apparently, Mr. William B. Allen, Chairman of the U.S. Commission on Civil Rights learned from one Barry Goodfield, that he intended to contact the child on the White Mountain Apache Reservation.

It is unclear whether Mr. Allen was invited to go along and simply accepted the invitation or determined for himself that a "foray" into the reservation was advisable. It is also unclear exactly how the federal marshals were brought into the picture, whether as they said, at the request of Chairman Allen, or by phone

call from Barry Goodfield. What is clear, however, is that the show of federal authority by both Mr. Allen and the U.S. marshals played a significant role in the subsequent events. Mr. Goodfield, accompanied by Mr. Allen, the two federal marsnals, an NBC news crew, and Mr. Goodfield's son and others, with obvious forethought and intent to conceal their actions and by show of federal authority, advised the high sch[illegible] principal not to contact anyone concerning their presence on the [illegible]servation or their purpose. The kidnapers and their accomplices, looked for the girl at several schools before they found her by following the school bus she was on from one school to another. Having located the child, Mr. Goodfield reduced her to tears, obviously for camera effect, by immediately showing her pictures of pets from her former home with such things as "We love you and miss you. Mom and Dad," written on the pictures. The abductors, by these actions in delivering written messages, photos of the family pets and the gift of a book, aided and abetted the former foster parents in violating a prohibition of their probationary status resulting from a guilty plea to a felony charge, which required they not contact the child. This obvious contempt by the former foster parents and their accomplices should not go unchecked.

The abductors with cameras rolling bombarded the child with questions. Mr. Allen asked the child if she wanted a ride home and when she said yes, he and the U.S. Marshals sat back and watched while Mr. Goodfield instructed the child to "walk down the road and pretend you are hitchhiking and I will pick you up." From the video tapes and their own later written and oral statements, it is patently clear that a kidnaping was intended and indeed occurred. The abductors and their

accomplices themselves used the word "kidnaping".

Mrs. Altana, the child's mother, having been called by the child's brother and advised that the child had been taken from the school grounds by strangers, pursued the vehicles, confronted Mr. Allen and Mr. Goodfield and demanded the release of her daughter. Mr. Allen and his associates released the child and left the reservation.

Acting on these facts which clearly establish that an unlawful abduction of a minor child had taken place, a request for assistance from other law enforcement agencies surrounding the reservation was issued. We appreciate the assistance and professional response of the Arizona Department of Public Safety and the Gila County Sheriff's Office. Because of them, the suspects were stopped by law enforcement officials and detained for questioning by tribal authorities. Had we not had the cooperation of these other agencies, we might not have known the identity of the kidnapers as quickly as we did.

Much was and is made of the fact that the child was unaware of a Notice of deposition scheduled for February 10, 1989. Mr. Allen seemed to believe that the child's custody was an issue in the case in which the deposition was to be taken. Mr. Allen simply did not bother to seek the facts. Had he done so, he would have found that an Arizona Court, on January 5, 1982, ruled that the Texas adoption decree was obtained by fraud and was invalid; he would have found that the decision was appealed and upheld on appeal, and he would have found that the Arizona Supreme Court declined to hear the case; therefore, there is no custody dispute in this case. Having lost their legal battle, the former foster parents became fugitives with no rights to the child. The deposition at issue relates to the natural mother's civil lawsuit against the former foster family for damages--

this is not a case where the child's custody is an issue. That issue was settled by the Arizona courts in 1982.

Mr. William B. Allen's actions on that day, to aid and abet other persons whose intent was to blatantly interfere with the rights of an Apache family, were clearly an assault on the inherent governing powers of the White Mountain Apache Tribe.

As you know, the United States Commission on Civil Rights, through its Subcommittee on Indian Civil Rights has for some time been conducting what it describes as an examination of civil rights in Indian country. In particular, the Commission is examining issues concerning the Indian Civil Rights Act, tribal justice systems, and the role of the federal government in the area of civil rights on reservations.

Mr. Allen has implied in public statements that it is the purpose of his Committee to act as a judge of tribal governments. Once again, it seems we have non-Indians eager to pass judgment on Indian people and their governments, apparently based on a false belief that they somehow better understand the so-called problems of Indian county and are better able to deal with those problems than Indian people themselves. Mr. Allen has gone so far as to say that Indians must be integrated into the mainstream of America--he hasn't bothered to ask the Indian people themselves if this is their desire. While the federal government's stated policy is self-determination for Indian people, this federal official boldly advances paternalism.

Within the boundaries of the White Mountain Apache Reservation, the Apache people are sovereign. In our homeland, we hold the long-cherished freedom to govern ourselves according to our own laws; laws

which have grown out of our culture, our history, and our religion. It is upon the foundation of this most basic freedom that tribal governments exist.

In the truest exercise of our inherit right to self-government, we, as Indian nations, must be free from outside interference with that right. Such interference undermines and chips away at the strength of our tribal governments and if left unopposed, it will rob us of the very will necessary to make the decisions which are vital to our survival.

Mr. Allen, on behalf of the United States Civil Rights Commission, Subcommittee on Indian Civil Rights, by his actions on February 7, 1989, has engaged in the type of unwanted and uninvited interference that I have just described.

In January, 1988, the child was reunited with her parents pursuant to court orders of both the State of Arizona and the White Mountain Apache Tribal Court. Mr. Allen, using his federal authority, saw fit to second-guess the judgment of the State and Tribal courts and to become personally involved in a settled case under the guise of investigating civil rights.

Mr. Allen, under escort by federal marshals, violated fundamental rights of an individual Apache family and the entire White Mountain Apache Tribe. Mr. Allen intruded onto the reservation without authority from the Tribe. He attempted to conceal his intended actions from the Tribe and most importantly, he violated the sacred rights of a family by interfering in the relationship between parents and their daughter.

By his actions, Mr. Allen has demonstrated a willingness on the part of the Civil Rights Commission to ignore the government-to-

government relationship which exists between the White Mountain Apache Tribe and the United States Government. Mr. Allen has also chosen to ignore the existence of valid tribal court and state court orders, which have determined that Lalita Altaha was fraudulently adopted and that her natural parents have for years been denied the love and affection, which it was their right to enjoy but which was taken from them by the unlawful adoption. It now appears that the Civil Rights Commission, through Mr. Allen, has engaged in the very kind of conduct that it has so loudly denounced and sought so hard to find in Indian country.

Senators, if this can happen to one Indian child on one Indian reservation, all Indian children on all reservations are in jeopardy. You, as the leaders of this nation, cannot allow this to happen again. Federal officials ought not be able to weild their authority to harm children. Lalita's emotional wounds were reopened for no responsible reason, her family's fear and emotional trauma were not necessary. Proper protocol, respect and common courtesy for Indian people and their governments would have spared this Apache family this pain. The Civil Rights Commissioner went beyond his authority and acted beyond reason. Mr. Allen's actions should be condemned. The statutory grant of authority to the Civil Rights Commission must be reviewed and revised if indeed Mr. Allen's actions can be said to be authorized by Congress.

We believe the law establishing the Civil Rights Commission and the implementing regulations clearly establish that the Commission is only a fact finding body. We do not believe Congress intended that it should take affirmative action in individual cases. We also believe

it would be helpful for Congress as it looks at reauthorization of the Civil Rights Commission to delineate more clearly in the Act itself, the scope of the authority of the Commission with respect to tribal governments. We believe the law places allegations of violations of civil rights on Indian reservations exclusively within the province of the tribal governments themselves. National efforts of certain special interest groups to discredit and undermine tribal governments ought not to be aided by the trustee. Such attacks upon the power of Indian tribes to manage their own affairs are contrary to the Constitution and laws of the United States.

If the Congress wants to assist in assuring that the civil rights of Indian individuals are protected, it can do so through strengthening tribal judicial systems. Furthermore, I doubt a real problem exists. According to data collected by the U.S. Civil Rights Commission itself in 1986, the White Mountain Apache Tribe tribal court had an annual caseload of 4,554 cases. The Commission's own data lists only three allegations of civil right violations. Two of those listed seem to be related to timelines of court action, "delay in scheduling of hearings", "delay/denial of appointment of counsel", and "inability to get court records", problems which could be remedied by additional staff and an updated computerized rather than manual system of recordkeeping. The third allegation listed states quite unabashedly "allegations of many abuses of civil rights (without specifically naming the violations)." That is hardly a basis to conclude that civil rights violations are rampant and go unchecked on the White Mountain Apache reservation. Furthermore I suggest that a public hearing in any off reservation non-Indian community on civil rights violations will surface more than three allegations where court

systems process at least 4,500 cases annually.

Senators, we do not deny there are problems. We simply suggest the problems are not of the kind or magnitude to require federal action which would undermine tribal sovereignty. Yes, assist us in developing better and more efficient and effective judicial systems but don't undermine our governments in the name of protecting civil rights.

Besides looking at the Civil Rights Commissions' authority and delineating it more precisely, I have two further recommendations for action by Congress arising out of these unfortunate events. Immediately following this kidnapping incident, the White Mountain Apache Tribe sought assistance from other law enforcement agencies. We received cooperation from the Arizona Department of Public Safety and the Gila County Sheriff's Office in apprehending the abductors. Our subsequent requests that appropriate criminal charges be considered, to date, have fallen on deaf ears. Partly, this is because the local County Attorney's office, correctly has acknowledged that his office has no jurisdiction to prosecute non-Indians for crimes committed against Indians on Indian reservations. Non-Indian perpetrators of crimes as serious as this incident, and even those involving sexual molestation of Indian children at schools on the reservations go unpunished because of a jurisdictional loophole in law enforcement. The State has no jurisdiction, the Tribe cannot protect itself and its citizens, and the federal government which does have jurisdiction in these matters simply does not act. It is my firm belief that the non-Indian individuals who purposely violated the rights of an Apache family and the sovereign authority of the White

Mountain Apache Tribe will not be called to answer for their outrageous conduct in any criminal proceeding.

This is not an isolated incident. In 1988, the White Mountain Apache Tribe's Police Department came into contact with non-Indians in a law enforcement situations in more than 500 incidents. The figures do not include the hundreds of violations of our Game and Fish Code. Of this 538, 28 were considered serious felonies. While federal authorities have jurisdiction over felonies, very few are prosecuted. The misdemeanors including assaults go unpunished by anyone. We ask the Committee to seriously consider authorizing Tribal jurisdiction over non-Indians, at least in misdemeanor situations.

Finally, the facts of the Lalita Altaha tragedy make it abundantly clear that federal oversite directed at State compliance Indian Child Welfare situations is sorely needed. Not only Congress, but the U.S. Supreme Court has recognized the importance of tribal jurisdiction over these cases. Nevertheless, non-Indians feel free to forum shop in state courts to evade the legal authority of Tribes. Arizona Courts acted correctly in the Altaha situation. However, had proper federal oversite been in place, the Texas courts could not have allowed the adoption of this Indian child in three months. Had Texas acted in compliance with the law called the Indian Child Welfare Act, the Altahas and this child might have been spared some of this grief and pain. I say "might have been" because the people involved are criminals, they purposely broke the law and evaded authorities for years. I believe you cannot by legislation always stop those with criminal intent but a strong oversite role will surely assist in State government compliance with the law.

In summary, a grievous tragedy occurred and it cannot be undone.

You, however, have the opportunity to assess the facts and take actions which will assure Indian families and Indian Tribes that this won't happen again. We ask you to look seriously at the authority Mr. Allen purported to exercise through the Civil Rights Commission, we ask you to consider tribal jurisdiction to protect Indian people and Indian Tribes from non-Indians committing crimes against Indians on reservations and we sincerely hope and request that you put strong federal oversite into State compliance with the Indian Child Welfare Act.

Thank you, and I and my staff are prepared to discuss with you any questions you may have.

LEGAL DEPARTMENT

WHITE MOUNTAIN APACHE TRIBE

Claudeen Bates Arthur
General Counsel

Scott Canty
Staff Attorney

February 10, 1989

Pete Taylor, Staff Attorney
SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
SH-838 Hart Senate Office Building
Washington, DC 20510

Dear Mr. Taylor:

The following facts constitute the background regarding the White Mountain Apache child, Lalita Altaha.

Lalita Altaha was born December 23, 1974, to a White Mountain Apache woman in Phoenix, Arizona. In June of 1975, the child was placed by her mother, Thurza Altaha, with a foster family, the Deroeschers through an agency called the House of Samuel. In November of 1975, the mother contacted the Deroeschers to request the return of the child. The Deroeschers persuaded her not to take the child back. Later, the mother moved to Texas. In December 1976, after concern about the number of children being removed from the reservation by the agency called the House of Samuel, the White Mountain Apache Tribe with the child's aunt, after approval was granted telephonically by the mother, appeared at the foster family home requesting the return of the child. The Deroeschers refused to return the child. They subsequently contacted the mother in Texas by telephone and asked to adopt the child. The next day they flew to Texas and presented the mother with a consent for a relinquishment and had her sign the form. The foster family then moved to Fort Worth, Texas in December of 1976 and in January in 1977 filed an adoption petition. The petition was granted on March 1, 1977. Shortly thereafter, the foster family moved back to Tucson, Arizona.

Upon the natural mother's petition, the Texas adoption decree was declared invalid in Pima County by the Arizona Superior Court and on February 11, 1982, the court transferred further proceedings regarding the child back to the White Mountain Apache Tribal Court. The Tribal Court ordered tribal representatives to pick up the child and return her to the reservation in January 1982. However, when the tribal

P.O. Box 700 • Whiteriver, Arizona 85941 • 602/338-4129 or 602/338-4346 Ext. 210

representatives arrived in Tucson, they were told the family had fled with the child leaving no forwarding address. The Deroeschers hid from the law with the child for approximately six (6) years from 1982 to early 1988. In January 1988, they turned themselves into authorities at the Pima County Sheriff's Office. Charges were brought against them and they subsequently pled guilty to Arizona Class VI felony charges. The Deroeschers were placed on probation for three (3) years and required not to contact the child except with permission of the Tribal Court or the parents of the child.

A civil suit was filed by the natural mother in 1984 against the foster family for tortuous interference with parental custody and for intentional infliction of emotional distress. That civil suit is ongoing and presently continues in discovery stages. Dr. Goodfield is listed as an expert witness by the Deroeschers; defendants in the civil case. Further information or the civil suit can be obtained by calling Hugh Hegyi of DNA of People's Legal Services at (602) 871-4151 in Window Rock, Arizona. The White Mountain Apache Tribe has not been involved directly in the civil litigation.

I hope this information will be of assistance to you. If you have any further questions, please feel free to contact me at (602) 338-4129. I am also sending you copies of a letter that was sent to our Arizona Congressional Delegation, a copy of the press release of the White Mountain Apache Tribe on this incident, copies of a report in the Arizona Republic. You should also know that the White Mountain Apache Tribe has contacted Governor Mofford and the U.S. Attorney's Office in Arizona to seek their assistance in this matter.

Sincerely

Claudeen Bates Arthur

Claudeen Bates Arthur
General Counsel

FA6:72

LEGAL DEPARTMENT

WHITE MOUNTAIN APACHE TRIBE

Claudeen Bates Arthur
General Counsel

Scott Canty
Staff Attorney

July 13, 1989

John Megavero
Printer, Editor
Select Committee on Indian Affairs
Washington, D.C. 205-10-6450

RE: Transcript of "Civil Rights White Mountain Apache Hearing of May 14, 1989.

Dear Mr. Megavero:

I am returning the transcript you forwarded on June 14, 1989, for review. I have made some corrections, both typographical and grammatical, none of which change the substance of the original testimony.

In addition, I ask that the following statement be added to the record as clarification:

On Page 37, when the Chairman asked if there was a treaty between the U.S. and the White Mountain Apache Tribe, Mr. Kane answered, "yes," Mrs. Arthur stated, "correct". A correction or clarification needs to be made on this point. There are agreements between the White Mountain Apache Tribe and the U.S. government which agreements are in the nature of treaties, however, a formal treaty ratified by the Senate of the U.S. between the White Mountain Apache Tribe and the U.S. government was never established. As stated by Ms. Arthur, the White Mountain Apache Tribe is a federally recognized Indian tribe organized and operated under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. 476 et. seq.

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I am also attaching copies of two letters which I would also like made part of the record.

Thank you for your attention to these matters.

Sincerely,

Claudeen Bates Arthur

Claudeen Bates Arthur
General Counsel

FA9:27

xc: Eric Eberhard

WHITERIVER UNIFIED SCHOOL DISTRICT NO. 20

P.O. BOX 190
Whiteriver, Arizona 85941
(602) 338-4842

Dr. Joseph M. Landavazo
Superintendent

Mrs. Fran Curtis
Business Manager

GOVERNING BOARD

Mr. Guy Massey Jr.
President

Ms. Hedy Beatty
Clerk

Mr. Jerry Gloshay Sr.
Member

Mr. Ermon Colelay
Member

Mr. Adam Lupe Sr.
Member

April 5, 1989

Mr. Murray Friedman
U.S. Commission on Civil Rights
1121 Vermont Ave. N.W.
Washington, D.C. 20425

Dear Mr. Friedman:

On behalf of the administration and Governing Board of the Whiteriver Unified School District, I wish to protest the actions of Mr. William B. Allen of the Civil Rights Commission. These actions took place on February 7, 1989 at the Whiteriver Middle School and at the campus of Alchesay High School in Whiteriver.

On that afternoon, Mr. Allen and those persons with him did speed on the campuses and surrounding area. They also removed a female student, Lolita Altaha in violation of School District Policy JEDB, JEDB-R, JFG, JFG-E and JHFA (attached).

Mr. Allen accompanied by U.S. marshals did not sign the student out, did not receive permission from either the high school or middle school principals. In fact, Mr. Carrington, high school principal, was admonished not to call anyone for thirty minutes.

The above actions has caused the school district to lose public confidence in the ability of the schools to provide for the safety and well being of its students.

Sincerely,

Dr. Joseph M. Landavazo
Superintendent

cc: Dennis DiConcini >> c/o Eric Eberhard
John McCain >> 833 Hart Senate Office Building
Rep. Jon Kyl >> Washington, D.C. 20510
Rep. Mo Udall >>

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UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

RECD APR 24 1989

April 18, 1989

Dr. Joseph M. Landavazo
Superintendent
Whiteriver Unified School
District No. 20
P.O. Box 190
Whiteriver, AZ 85941

Dear Dr. Landavazo:

I have your letter of April 5 expressing concern with regard to Chairman William Allen's actions at the Whiteriver Middle School and at the campus of Alchesay High School in Whiteriver.

As you may know, Chairman Allen has apologized for the entire incident. In addition, speaking for the other members of the Commission, I have also apologized for this incident.

It has been an unhappy episode for all concerned and perhaps the best thing now is to let the matter rest.

Cordially,

Murray Friedman
Vice Chairman

MF/cs

INTERVIEW WITH TRACY CARRINGTON, PRINCIPAL,
ALCHESAY HIGH SCHOOL,
BY CLAUDEEN BATES ARTHUR
February 10, 1989

This interview took place in the office of Mr. Tracy Carrington, Principal of the Alchesay High School, on February 10, 1989. Present at this interview were Gene Nelson, Claudeen Bates Arthur, and Cheryl Ricker.

Claudeen Bates Arthur introduced herself and her secretary, Cheryl Ricker, to Mr. Carrington and informed him that the purpose of this interview was to obtain information from his point of view concerning the events which took place at the Alchesay High School on Tuesday, February 7, 1989 regarding Lalita Altaha. Ms. Arthur informed him that Cheryl Ricker was present to take notes of this interview, which would be typed up and a copy provided to him.

Ms. Arthur asked if Mr. Carrington would be willing to sign a written statement concerning this matter, to which Mr. Carrington responded yes. Ms. Arthur then asked if he had any reports on this matter which she could have a copy of. Mr. Carrington said he did have a report which he gave to Vince Hubbard, BIA Investigator. He said he would get her a copy or she could request a copy of it from Mr. Hubbard which may be faster.

Ms. Arthur asked how this matter all came about on that particular day. Mr. Carrington stated that at approximately 2:45-2:50 p.m. that day, four men dressed in suits, one of which identified himself as a U.S. Marshal, came to the high school

and asked if Lalita was a student here. Mr. Carrington said he carefully checked out the I.D. which is normal procedure when he didn't know someone. He identified the man as a short man. Mr. Carrington said he only knew Lalita by "L.J.". He then checked through his student roster and did not have Lalita Altaha on the list. He then informed the men that she was not a student here and told them to check at the Middle School, to which they asked for directions to. Ms. Arthur asked what these mens' names were. Mr. Carrington said the man only said they were U.S. Marshals, a doctor and an attorney and did not give him any names. Ms. Arthur asked if they said what they wanted. Mr. Carrington said they did not say what they wanted. He then asked for directions to get to the Middle School. The man then asked if he knew her parents and a member of Mr. Carrington's staff, Betty Tortice, told them she did know Lalita's parents, that they were relatives of hers and informed the man of Thurza's place of employment at the Rainbow Treatment Center. Mr. Carrington said the man then told him not to call anyone for 30 minutes concerning this matter. He said this was not unusual for a law enforcement official to do.

Ms. Arthur asked if he attempted to contact the Middle School. Mr. Carrington said he did not. Mr. Carrington said Mr. Nelson called him later that afternoon. This was the extent of Mr. Carrington's direct contact with the men. Mr. Carrington said the newsmen and cameramen never came into the school. However a student did bring to their attention that there was a cameraman and newsman were getting into their car, a light

sedan. The camera's were not marked in any way as to identify their news team. Mr. Carrington said he viewed them from the window as they were getting into their van and left.

Mr. Carrington said that anyone wishing to remove a child from school is requested to sign a form; although if a law enforcement official refuses to do so, they do not have to. If these men wanted to take Lalita, they would have been asked to complete the form. This form was created due to problems that were occurring 4-5 years ago when law enforcement officials were taking students without their knowledge.

Ms. Arthur asked if the school board has any regulations on taking children from school grounds. Mr. Carrington informed her that only a parent or guardian can come in and "sign-out" a student. Otherwise, any other person wishing to sign out a student must have a note from the parent, or the parent must telephone the school and let them know that someone will be picking up their child. Mr. Carrington said he will ask for identification from someone if he does not know who they are.

Ms. Arthur asked what if they wanted to talk to a child. Mr. Carrington responded that he would allow that to occur because it usually was when they were a witness or suspect in a case. If the parents are not available, then someone from the school, an adult person, will sit in on the conversation, on school grounds. If a law enforcement official takes a child, they must sign the form, which says that the school will notify the parents immediately. If they cannot locate the parent, then they will note this on the form that they attempted to contact

the parent. Mr. Carrington said they never had anyone fail to sign the form. In cases with the CHR, in some venereal disease cases, they have legal right not to have an adult person present, but so far they have been sitting in on these matters. Mr. Carrington said a recent Attorney Generals' Opinion states that in these types of matter, an adult does not need to be present.

The following is second, or third hand information. Mr. Carrington said Mr. Nelson informed him that these men got lost on their way to the Middle School. When they got there they showed Mr. Nelson their I.D. and U.S Marshal's badge, and said they want to see, not remove, Lalita. Mr. Carrington said he would like to refer to Lalita as "L.J.". Mr. Nelson said he then informed the men that she's on the second bus on the line. The men then went to the bus and asked to talk to her.

Mr. Berech, who was on bus duty at the high school at the time the men were there, said that no one appeared to be upset and there were no obvious disruptions.

Ms. Arthur asked whether there were students standing around at that time.

Mr. Carrington replied yes, many children, approximately 253 bus rides were around trying to get into approximately ten buses. Mr. Carrington also informed Ms. Arthur that Gillespie Childs was the bus driver on Lalita's bus, which goes to Cedar Creek and Carrizo. Mr. Carrington will get a report from the bus monitor concerning this matter.

Mr. Carrington said that L.J.'s brother came into the high school, in a hurry, to ask to use the phone. Ms. Arthur asked if he was upset. Mr. Carrington responded that he appeared concerned but not panicked. Lalita's brother said they took his sister off the bus. He called his mother and then left. The teacher, Mr. Berech, then came in and asked what was going and and said there are some guys talking to a girl.

Ms. Arthur asked who else besides the students and the teachers saw what happened. Mr. Carrington responded probably Gillespie. They all were beside his bus when they were talking to her. Mr. Carrington said he did not know Lalita had been removed from the bus; he assumed that she was picked up at the Middle School. After the thirty minute time period passed, he called Mr. Nelson at the Middle School.

Ms. Arthur asked if the men came back again later. Mr. Carrington said no, not to his knowledge. Mr. Carrington said he spoke to Andrew Kane and Vince Hubbard on that Tuesday night. During the J.V. high school game, Mr. Kane and Mr. Hubbard asked to speak to him, so they all went to his office. They asked him what the men looked like. While they were in his office, they got a call informing them that they were holding the men in Globe, so they left. The next day they, Mr. Kane and Mr. Hubbard, came back and told him what happened. At the time of their meeting it seemed that the men took Lalita and still had her at the time they were stopped in Globe, but this was not so. Mr. Carrington then explained their vulnerability to law enforcement agencies - them doing things they shouldn't. Mr.

Carrington said he did not remember the last time he was shown a warrant. Marshals, sheriffs or FBI are usually accompanied by the Local police department and usually do not come alone.

Ms. Arthur asked Mr. Carrington if he knew whether the men had asked Mr. Nelson to refrain from calling anyone. Mr. Carrington said Mr. Nelson said they were in a hurry and took off without saying anything. Mr. Carrington also said he has never had a law enforcement official tell him not to call anyone for thirty minutes; they usually just tell him not to talk to anyone about the matter they discussed.

Ms. Arthur asked how Lalita was at the game. Mr. Carrington said she was fine. His daughter, Melissa, is in the same class, the 8th grade, as Lalita and is a friend of hers. Melissa spoke to Lalita that night at the game and Lalita told her she talked to some guys.

Ms. Arthur asked if Mr. Carrington had any other information since February 7th. Mr. Carrington said no, only second hand information and what he saw on the news the other night on television, which he recorded. He said they showed a portion of the taped conversation with Lalita in which they asked her "Do you want to ride home with us?" and she responded "Yes". Mr. Carrington said he would have asked these people to sign a form or card and then he would have notified Lalita's mother. Only in a case of an abuse investigation would he not have notified the parents.

Ms. Arthur asked if Mr. Carrington has any other information subsequent to this event. Mr. Carrington said Chief Kane

and Vince Hubbard said the U.S. Marshals came back and they were holding a news conference. His staff informed him that Channel 13 came and asked if they could interview him, however they were told to contact the District Office. The news team then took a picture outside the high school and left. They said something about having a catch a plane in Show Low. He also said Mr. Nelson had Channel 4 filming outside his school, but they were putting their equipment away when he noticed them.

Mr. Carrington said he's heard second or third hand information saying Lalita wanted to go with the men, and then others saying she didn't want to go with them. Mr. Carrington said he has not yet talked to the bus driver, Gillespie Childs. Briefly, Mr. Carrington summarized the events which took place that day, saying, the men came to the high school and asked if the student, Lalita, was here. They were told she was not there and then they were given directions to the Middle School. Mr. Carrington said he would have let the men take Lalita because they were law enforcement officials. These officials can do this and he cannot stop them. However, in some situations the students don't want to talk to the officials and he has advised them that they don't have to talk if they don't want to.

Ms. Arthur then asked who Mr. Childs worked for. Mr. Carrington said Mr. Childs drives the bus three hours a day, to and from Carrizo. During the no driving period he does custodial work for the District Office. Mr. Carrington said Gillespie Childs would have better information concerning what

occurred near the bus. The teacher on duty, Mr. Berech, had no idea what was happening.

* * END OF INTERVIEW * *

WHITE MOUNTAIN APACHE TRIBE

By Claudeen Bates Arthur
Claudeen Bates Arthur
General Counsel

CONCURRENCE:

Tracy E Carrington
Tracy Carrington, Principal
Alchesay High School

INTERVIEW WITH GENE NELSON, PRINCIPAL,
WHITERIVER MIDDLE SCHOOL,
BY CLAUDEEN BATES ARTHUR
February 10, 1989

This interview took place in the office of Mr. Gene Nelson, Principal of the Whiteriver Middle School, on February 10, 1989, at approximately 11:10 a.m. Present at this interview were Gene Nelson, Claudeen Bates Arthur, and Cheryl Ricker.

Claudeen Bates Arthur introduced herself and her secretary, Cheryl Ricker, to Mr. Nelson and informed him that the purpose of this interview was to obtain information from his point of view concerning the events which took place at the Whiteriver Middle School on Tuesday, February 7, 1989 regarding Lalita Altaha. Ms. Arthur informed him that Cheryl Ricker was present to take notes of this interview, which would be typed up and a copy provided to him.

Ms. Arthur asked if Mr. Nelson would be willing to sign a written statement concerning this matter, to which Mr. Nelson responded yes. Mr. Nelson stated that he also had some letters concerning this matter and which contain his statement concerning the events which occurred on February 7, 1989. Mr. Nelson said he would provide Ms. Arthur with a copy of the letters.

Ms. Arthur asked how this matter all came about on that particular day. Mr. Nelson stated that at approximately 3:18, just after school was out, four (4) men came into the office from the door leading out to the hallway. One man

introduced himself to Mr. Nelson and showed him his Identification shield or credentials. Ms. Arthur asked Mr. Nelson what this man's name was. Mr. Nelson said he did not remember. Ms. Arthur asked if it was Mr. Skagg. Mr. Nelson said he did not remember the name. Mr. Nelson said this man then introduced the other men to him. He also did not recall any of their names; only that there were four men altogether; three white men and one black man.

Ms. Arthur asked if they identified who they were with, or did they mention that one person was with the NBC News team or the Subcommittee on Civil Rights. Mr. Nelson responded that he only gave him his name and showed him his badge, and also gave the names of the other men accompanying him. Ms. Arthur then asked if any attorneys were present in the group. Mr. Nelson responded no. Mr. Nelson then said the man said he'd like to see one of his students by the name of Lalita Altaha. Ms. Arthur asked if they pronounced her name correctly and Mr. Nelson responded yes. Ms. Arthur then told Mr. Nelson that Lalita said they had pronounced her name incorrectly when they were on the bus. Mr. Nelson informed Ms. Arthur that they know Lalita here by "L.J.".

Mr. Nelson then informed this man that he may have missed her because school was already out and the buses are ready to leave. The man then asked Mr. Nelson to show him which bus Lalita rides. During this time the other men never said anything to him. Mr. Nelson said he then showed the man out of the window the bus Lalita rides, which was just pulling out. At

this point he noticed outside one man with a camera and another man with a microphone. He said there were no markings on the camera such as "NBC". They were already rolling the camera. Ms. Arthur asked if he could identify any of the men and Mr. Nelson only said they were all white. Ms. Arthur asked if he could identify the man with the microphone, which Mr. Nelson said he could not.

Mr. Nelson continued: the man then asked where the bus would stop next, to which Mr. Nelson responded "the High School". The men then ran to their cars which were parked closer to the old entrance to the Middle School. Mr. Nelson stated that the men ran in front and between the buses to get to their cars, and stopped the buses just to get their vehicles out, and they were out of here in a hurry, "gravel flying".

Ms. Arthur asked Mr. Nelson to describe the vehicles. Mr. Nelson said there were three vehicles: one brown van, a light colored Lincoln Town Car and a light chevy sedan. Ms. Arthur then asked if they had asked to talk to Lalita. Mr. Nelson said no, they just wanted to see her. Ms. Arthur then inquired whether the School Board had regulations on who can and cannot see children on school grounds. Mr. Nelson replied that the whole school district go by the same rules. They have consent forms which need to be completed before anyone removes a child. The police and the Child Protective Service have authority just on an officer's word to take a child. Mr. Nelson said the local police were very cooperative. They always sign the form before taking a child for arrest. However, if they wanted

to speak to a child, this must be done in the presence of himself or someone else. Mr. Nelson said that they would have allowed these people to speak to Lalita, but would not have allowed them to film her. Mr. Nelson also said one of his staff members, Mr. Nolan, informed him that these men did not come in through the office door, but they parked near the old entrance and walked through the old entrance of the building and down the hall. Mr. Nolan also followed them through the hallway to the office. Mr. Nelson said that had this occurred earlier in the day, no teacher would have let Lalita out to speak with these people. Usually all visitors must report first to the office, and these men should have known that. Mr. Nelson also noted that one man never came in. There were four men in his office, but when they left he noticed that there were five.

Mr. Nelson then began to read Mr. Nolan's report concerning this matter, stating that the Whiteriver Middle School was boarding buses when five individuals ran through the children creating confusion. The individuals then got into three vehicles: one tan 4-door, one brown van and one Town Car. All three vehicles were unmarked and had no flashing lights.

Mr. Nelson said that another member of his staff, Elaine Kessay, noticed another man with a camera recording the kids coming from the school entrance.

Yesterday, a Mike Gilbert, had his camera rolling again near the cattle guard. His camera was on a tripod, and when Mr. Nelson approached him and asked what he was doing, he began loading up his equipment and putting it in the truck of

his car. A John Thompson of Channel 4 said he was getting landscape shots. This man also said that the Chairman gave him permission to come over to the school and do this. This man also said that since he got the Chairman's permission he didn't think he had to get permission from the school. Ms. Arthur informed Mr. Nelson that she was in the press conference with the Chairman and he did not give anyone permission to film the school.

Mr. Nelson said that he had heard that Channel 13 was also at the High School.

Ms. Arthur asked if Lalita was in school and Mr. Nelson said yes. She was only out one day, which was Wednesday, February 8, 1989. He said that Lalita's mother told him that she would be out of school for two days because the FBI needed to interview her, however she did show up for school on Thursday.

Ms. Arthur asked if there were people Lalita could talk to if she needed to. Mr. Nelson said that Lalita comes in to talk to him, Mr. Nolan and the counselor, Mr. Jones. Mr. Nelson said she is doing well and does have people to talk to, however Tuesday's events did not help any and are very upsetting to a child of 14. Ms. Arthur informed Mr. Nelson that she told Lalita that she was entitled to have someone, other than who her parents wanted, to talk to. Mr. Nelson said he told her that she could just say "no comment" if she didn't want to talk to anyone about this matter. Mr. Nelson said that Lalita is concerned about the publicity. Ms. Arthur stated that she will

have to be in the middle of all this. The Tribe has to respond to this matter which will involve Lalita.

Mr. Nelson stated that this morning Lalita told Mr. Nolan that whatever I say will hurt somebody. Mr. Nelson then asked how the schools were involved in this. Ms. Arthur said that she wrote a letter to Governor Mofford requesting that she look into this matter due to the fact that it took place on school grounds. She also wrote a letter to the school board. Mr. Nelson stated that he was very disappointed with the Marshals and the OCR.

* * END OF INTERVIEW * *

WHITE MOUNTAIN APACHE TRIBE

By Claudeen Bates Arthur
Claudeen Bates Arthur
General Counsel

CONCURRENCE:

_____
Gene Nelson, Principal
Whiteriver Middle School

FILED
MAY 16 1989
RICHARD H. WEARE, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF ARIZONA

LALITA JOHANNA ALTAHA, Plaintiff, vs. THURZA JOHNSON ALTAHA and LOWELL ALTAHA, husband and wife; DNA-PEOPLE'S LEGAL SERVICES, INC.; WHITE MOUNTAIN APACHE TRIBE; UNITED STATES OF AMERICA, BUREAU OF INDIAN AFFAIRS, Defendants.	)	CIV 89-482 PHX RCB O R D E R

Alex Gaynes, a lawyer, filed a complaint in this action on March 15, 1989 purportedly on behalf of plaintiff, Lalita Altaha, naming as defendants her biological parents Thurza and Lowell Altaha ("the Altahas"), DNA-People's Legal Services, Inc. ("DNA"), White Mountain Apache Tribe ("the Tribe"), and the Bureau of Indian Affairs ("BIA"). On April 19, 1989, Gaynes also filed an application for a preliminary injunction

on behalf of Lalita. The following day, plaintiff lodged with the Clerk of the Court a proposed order for a writ of habeas corpus ad testificandum directed against the named defendants to have them "release and transport" Lalita to allow her attendance at the hearing on her application for a preliminary injunction. The court declined to sign the writ but did set a hearing on the application for preliminary injunction for April 27, 1989. Lalita was not present at the hearing.

At the hearing, the court expressed its concern that it lacked subject matter jurisdiction over this dispute and therefore focused the parties' arguments on this initial issue rather than on a general, merits discussion of plaintiff's complaint. However, the court also allowed the parties to present evidence concerning the serious allegations of physical and mental abuse alleged in the complaint. The court stated at the conclusion of the hearing that it was not persuaded that any immediate relief was necessary under the circumstances, and took the issue of its subject matter jurisdiction under advisement. After considering the parties' arguments, and reviewing the complaint and petition, the court finds that it lacks subject matter jurisdiction over this dispute and therefore dismisses the complaint and action.

FACTS

At the April 27, 1989 hearing, it quickly became apparent to the court that the instant litigation is a continuation of a prolonged and acrimonious, fourteen-year custody dispute

among Lalita's former adoptive parents, her biological parents and the Tribe. The facts underlying the first stage of this struggle -- lasting approximately seven years -- are set forth by the Arizona Court of Appeals in Goclanney v. Desrouchers, 660 P.2d 491 (Ariz. App. 1982), and will not be repeated here. The facts underlying the second phase of this dispute, beginning with the court of appeals' 1982 decision and lasting until January of 1988, were set forth at the hearing by counsel for the Tribe and were essentially uncontested by counsel for Lalita, to wit: Lalita's former adoptive parents secreted her from tribal authorities and her biological parents until January of 1988 when they returned to Arizona with her and pled guilty to Arizona Class VI felony charges.[1] The child is currently fourteen years of age, living with her biological parents, and designated as a ward of the Tribal Court.[2] The third and final phase of this custody dispute appears to be the instant lawsuit.

Lalita's purported attorney, Alex Gaynes, alleges that she is a minor child residing on the White Mountain Apache

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[1]The former adoptive parents, the Desrouchers, were placed on probation for three years and as a condition of that probation were forbidden to contact the child without first obtaining permission from the Tribal Court or the biological parents of the child.

[2]Counsel for the Tribe so advised the court. Counsel for Lalita, although expressing surprise at this revelation, gave no indication that he had information upon which to dispute it.

Reservation who seeks to have Gaynes represent her and is being denied the right to counsel. Attorney Gaynes represented the former adoptive parents, the Desrouchers, in previous civil and criminal matters relating to this custody dispute and is presently representing them in a civil suit filed by the child's biological parents. According to the complaint filed on her behalf, she has

> expressed a desire to communicate with her counsel concerning allegations of physical and mental abuse, and concerning her legal status. Plaintiff's mail has been intercepted, and opened, she is unable to make telephone calls, and her liberty and rights of assembly, equal protection, right to counsel, freedom of speech, right to be free from abuse, and right to petition for redress of grievances through the abuse of counsel have been abridged on a continual and continuing basis.

Complaint, p. 2, ¶ 3. Lalita's purported complaint seeks, inter alia, intervention by the court to "issue any orders necessary, including injunction, or mandamus to protect her right to consult with the attorney of her choosing so that she, rather than others, may make decisions concerning her future legal well-being." Id., p. 6, ¶ 1.

At the hearing before this court an extended videotape received in evidence reflects, inter alia, that the Chairman of the United States Civil Rights Commission, William Allen, one Barry Goodfield, and others traveled to, on and about the Ft. Apache Indian Reservation on February 15, 1989, seeking to locate Lalita, a fourteen year-old Native American child. Exhibit 1. After traveling to several schools she was located

apparently at the end of a school day and, in a tearful and emotionally charged rendition, indicated a desire to live with her former adoptive parents, the Desrouchers, adding that she was unhappy living on the reservation and had engaged in an altercation with her biological mother. At one point she recited the circumstances of a planned trip to court--which in reality was a deposition--arranged by Gaynes and counsel for the biological parents to occur in Gallup, New Mexico. Although originally agreed to by the biological parents, it was thwarted when, in the middle of the trip, they apparently decided against attending the session and returned home with Lalita.

Goodfield, who initially tried to characterize himself as a psychologist but later turned out to be a marriage counselor from California and in the court's mind nothing more than an investigator hired by the Desrouchers, exacerbated and exploited Lalita's circumstances by the fashion in which he confronted and questioned her. His sincerity and motivation can seriously be questioned as his verbalizations of love and concern are contradicted by his actions as reflected on the video tape. During this questioning he asked Lalita if she wished to have Gaynes represent her. Lalita said that she did.

Although appearing to have an independent purpose of his own in traveling to the reservation, Chairman Allen appears to have prevented Goodfield from effectively removing (the two

use the term "kidnapping") Lalita from the reservation as it appears was Goodfield's original intention, and not returning her to her biological parents' home after that school day. Goodfield eventually did return Lalita to her home but with an apparent motivation, among others, to confront the mother.

Two letters were also received in evidence, both purporting to have been written by Lalita, one addressed to the court and the other to Gaynes. Exhibit 2. Though undated, the letters apparently were written just prior to the hearing and more than two months after the video-taped confrontation. They indicated that Lalita wanted to remain on the reservation with her biological parents, that she was learning the ways of the tribe, and did not want Gaynes to pursue this matter. Neither Gaynes nor the court were previously aware of the letters until they were disclosed at the hearing. The biological mother positively authenticated these letters but the former adoptive mother expressed doubt that they were written by Lalita based on the nature of the handwriting. Whether Lalita actually wrote the letters or was pressured into writing them is unknown.

ANALYSIS

The court raises the issue of subject matter jurisdiction sua sponte because it must assure itself that the parties are properly before the court. Because this federal court is one of limited jurisdiction, it is presumed to lack subject matter jurisdiction in a particular case unless the contrary is

affirmatively established. See Stock West, Inc. v. Confederated Tribes, No. 87-4123, slip op. at 4080 (9th Cir. April 20, 1989); California ex rel. Younger v. Andrus, 608 F.2d 1247, 1249 (9th Cir. 1985). Plaintiff asserts that the court has subject matter jurisdiction over this dispute pursuant to 42 U.S.C. §§ 1981, 1983, 1985(3), and 28 U.S.C. § 1361. Complaint, p. 2, ¶ 5.

As an initial matter, the court notes that although plaintiff relies in her complaint upon 42 U.S.C. §§ 1981, 1983, and 1985 to invoke the jurisdiction of the court, this is in error because these provisions do not grant subject matter jurisdiction; they merely provide a remedy in cases in which jurisdiction is present pursuant to 28 U.S.C. § 1343.[3]

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[3]28 U.S.C. § 1343 states in pertinent part:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or all persons within the jurisdiction of the United States;

See Giles v. Equal Employment Opportunity Commission, 520 F. Supp. 1198, 1199 (E.D. Mo. 1981); Quarles v. Texas, 312 F. Supp. 835 (S.D. Tex. 1970). The court will construe plaintiff's jurisdictional allegations as an assertion of the court's subject matter jurisdiction pursuant to section 1343 and will therefore treat the complaint at this time as having been amended to contain a statement that the court's jurisdiction depends on 28 U.S.C. § 1343 as required by Fed. R. Civ. P. 8(a)(1). See, e.g., Weaver v. Hayworth, 410 F. Supp. 10032, 1033 (E.D. Okla. 1975).

In other words, the court must determine whether the various allegations in the complaint state valid causes of action under 42 U.S.C. §§ 1981, 1983, and 1985.[4] Because it is not clear from the pleading which of these substantive statutes serves as a jurisdictional basis for which cause of action asserted against the various defendants, the court will assume that the complaint alleges the availability of subject

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(4) To recover damages and to secure equitable relief or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote;

[4]Plaintiff's complaint also asserts a cause of action under 42 U.S.C. § 1986, although she does not allege this cause of action as a grounds for the court's jurisdiction. Because plaintiff's section 1986 claim is derivative from 42 U.S.C. § 1985(3), the court will analyze first the conspiracy claim. To the extent that plaintiff fails to establish a viable cause of action under section 1985, then her complaint would also fail to state a claim under section 1986. See Wagar v. Haskenkrueg, 486 F. Supp. 46 (D. Mont. 1980).

matter jurisdiction over each defendant under each of the statutory bases. The court will therefore discuss seriatim the viability of these proffered bases for the court to assume subject matter jurisdiction over this dispute.

(1) 42 U.S.C. § 1981:

Plaintiff contends that the court maintains subject matter jurisdiction over this litigation pursuant to 42 U.S.C. § 1981. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981. The complaint alleges that Lalita is "entitled to relief pursuant to 42 U.S.C. § 1981, requiring equal rights under the law, and seeks to impose these rights against the Federal Government, agencies and organizations, as well as Defendants, Thurza and Lowell Altaha." Complaint, p. 5, ¶ 12. This particular statute was enacted pursuant to the thirteenth amendment to the Constitution and, therefore, an allegation of racial discrimination is required to state a cause of action under it. See, e.g., Davis v. Weidner 421 F. Supp. 594, 597 (E.D. Wisc. 1976), aff'd, 596 F.2d 726 (7th Cir. 1979). Although § 1981 does not itself use the word "race," the Supreme Court has construed the statute to proscribe solely "racial" discrimination. See Saint Francis

College v. Al-Khazraji, ___ U.S. ___, 107 S. Ct. 2022, 2026, ___ L. Ed. 2d ___ (1987)(citing Runyon v. McCrary, 427 U.S. 160, 168, 96 S. Ct. 2586, 2593, 49 L. Ed. 2d 415 (1976)).

At oral argument, counsel for plaintiff was asked by the court to point to any allegation in the complaint which meets this pleading requirement. Attorney Gaynes was unable to cite any portion of plaintiff's pleading alleging racial animus or discrimination. An independent reading of the complaint by the court confirms that it contains no such language. Because the complaint is devoid of allegations of racial discrimination, this court cannot entertain plaintiff's section 1981 claim and this part of the complaint must be dismissed against all defendants for failure to state a claim upon which relief may be granted as well as for lack of subject matter jurisdiction.

(2) 42 U.S.C. § 1983:

Plaintiff also contends that the court maintains subject matter jurisdiction over this litigation pursuant to 42 U.S.C. § 1983. Complaint, p. 5, ¶ 13. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983. It is undisputed by the parties that by the very language of the statute, "state action" is required to allege a colorable section 1983 cause of action.

At oral argument, counsel for plaintiff was asked by the court to identify the purported state actors in this lawsuit. Attorney Gaynes responded without citation to the record, statutory authority, caselaw, or further elaboration that the actions of defendant DNA constitute state actions for the purposes of section 1983. The court rejects this argument as meritless -- plaintiff has demonstrated no connection between the not-for-profit legal services provided by incorporated defendant DNA and the State of Arizona. In fact, the court notes that defendant DNA is a grantee of the Legal Services Corporation, established by the Congress. Furthermore, the court is unaware of any state monies donated to defendant DNA, nor has its attention been directed to any. In any event, whether the funding for DNA's services comes from federal or state coffers, the court concludes that as a matter of law public law services cannot constitute state action for the purposes of section 1983. See Polk County v. Dodson, 454 U.S. 312, 321, 102 S. Ct. 445, 451, 70 L. Ed. Ed. 509 (1981)(county public defender does not act under color of state law when performing traditional lawyer functions as counsel to indigents). Except for the source of a public lawyer's salary, he or she performs the same functions as a private attorney retained by counsel. Id.; see Franklin v. State of

Oregon, 662 F.2d 1337, 1345 (9th Cir. 1981). The court concludes that defendant DNA is merely acting as counsel for defendants Altahas, who are themselves private-party litigants in this action and clearly not state actors.

Furthermore, the tribal defendant cannot be the requisite state actor as "[t]he White Mountain Apache Tribe is certainly not a state or territory or the District of Columbia!" A & A Concrete, Inc. v. White Mountain Apache Tribe, 676 F.2d 1330, 1332 (9th Cir. 1982). No section 1983 action can be maintained which alleges deprivation of constitutional rights under color of tribal law because "Indian Tribes are 'separate sovereigns pre-existing the Constitution,' and are thus unconstrained by constitutional limitations on federal or state authority." R. J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 981 (9th Cir. 1983)(quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 n.7, 98 S. Ct. 1670, 1675 n.7, 56 L. Ed. 2d 106 (1978)). Moreover, as the purpose of section 1983 is to enforce the provisions of the fourteenth amendment, Monroe v. Pape, 365 U.S. 167, 171, 81 S. Ct. 473, 475, 5 L. Ed. 2d 492 (1961), actions taken under color of tribal law are beyond the reach of this statute and may only be examined under the provisions of the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-03. See Santa Clara Pueblo, 436 U.S. at 54, 98 S. Ct. at 1675; R. J. Williams Co., 719 F.2d at 982; 25 U.S.C. § 1302.

The court also notes that the purported plaintiff has no

remedy in federal court against the Tribe under the ICRA since the exclusive remedy in federal court for enforcement of the provisions of 25 U.S.C. § 1301 is a habeas corpus action brought pursuant to the requirements of 25 U.S.C. § 1303.[5] Santa Clara Pueblo, 436 U.S. at 65, 98 S. Ct. at 1680-81. No such habeas relief is explicitly sought against the tribal defendant in the instant complaint and application for preliminary injunction. To the extent that plaintiff's proposed writ of habeas corpus ad testificandum may be construed to be an attempt to utilize the remedy available under section 1303, the court denies this application because plaintiff's counsel failed to demonstrate at the April 27, 1989, hearing that any tribal "detention order" existed which could be challenged pursuant to this statute. The only evidence adduced at the preliminary injunction hearing showed that Lalita lives at the home of her biological parents, defendants Altahas, and is not being detained by the Tribe. That she is a ward of the Tribal Court, by itself, does not establish such detention. The court concludes that all other enforcement actions must be brought in the tribal courts pursuant to the ICRA and the Indian Child Welfare Act of 1978

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[5]The only remedial provision expressly supplied by the Congress, the "privilege of the writ of habeas corpus," is made "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303.

("ICWA"),[6] 25 U.S.C. §§ 1901-63. See Mississippi Band of Choctaw Indians v. Holyfield, ___ U.S. ___, ___, 109 S. Ct. 1597, 1610-11, ___ L. Ed. 2d ___ (1989).

It is also clear from the language of section 1983 and subsequent caselaw that actions of federal officials taken pursuant to federal law cannot form the basis of a claim under 42 U.S.C. § 1983. See, e.g., Church of Human Potential, Inc. v. Vorsky, 636 F. Supp. 93 (E.D.N.J. 1986). To the extent that plaintiff alleges federal officials violated her civil rights, the United States has not waived its sovereign immunity to such a suit. The remedy available to plaintiff is to sue the federal officers in their personal capacity. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971); see also Carlsberg v. Gatzek, 442 F. Supp. 813 (C.D. Cal. 1977). No federal officials are named as defendants in their personal capacities in this suit, nor are any specific federal officials mentioned in the body of plaintiff's

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[6]The jurisdictional provision of the ICWA reads in full:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

25 U.S.C. § 1911(a).

complaint. The sole federal defendant is BIA.

Actions of federal officers may be subject to suit under section 1983 if there are allegations of a joint conspiracy with state officials. See, e.g., Peck v. United States, 470 F. Supp. 1003 (S.D.N.Y. 1979). The complaint alleges that "Federal officials on the reservation, including the Defendants herein, and including the Tribe an [sic] Tribal authorities, as well as Defendants, Thurza and Lowell Altaha, have conspired to violate Plaintiff's legal rights." Complaint, p. 5, ¶ 11. However, as the court above concludes, no state officials are named as defendants or alleged to be co-conspirators. Since the complaint contains no allegations of state action, this court cannot entertain the section 1983 claim and this part of the complaint must be dismissed for failure to state a claim upon which relief may be granted as well as for lack of subject matter jurisdiction.

(3) 42 U.S.C. § 1985(3):

Plaintiff also relies on 42 U.S.C. § 1985(3) as a basis for this court to maintain subject matter jurisdiction over this lawsuit. Section 1985(3)[7] provides a private civil

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[7]Section 1985(3) provides in pertinent part:

> If two or more persons ... conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance

remedy for persons injured by conspiracies to deprive them of their right to equal protection of the laws. In Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971), the Supreme Court held that the coverage of section 1985(3) reached individuals acting in a purely private capacity. The Court also enumerated the guidelines for measuring the sufficiency of a complaint under section 1985(3):

> To come within the legislation a complaint must allege that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

403 U.S. at 102-03, 91 S. Ct. at 1798 (quoting 42 U.S.C. § 1985(3)).

The Griffith decision cautions, however, that although

> of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

section 1985(3) was intended to reach private action, it was not the Congress' intent to reach "all tortious, conspiratorial inferences with the rights of others." Id. at 101, 91 S. Ct. at 1798. The Supreme Court therefore refined the second element set forth above to require "some racial, or perhaps otherwise class-biased, invidiously discriminatory animus behind the conspirators' actions." Id. at 102, 91 S. Ct. at 1798 (footnote omitted); see A & A Concrete, Inc. v. White Mountain Apache Tribe, 676 F.2d 1330, 1333 (9th Cir. 1982)("must allege invidiously discriminatory class-based animus"); Life Insurance Co. of North America v. Reichardt, 591 F.2d 499, 502-05 (9th Cir. 1979). Further, the Ninth Circuit Court of Appeals requires facts to be alleged in the complaint which demonstrate this invidiousness. A & A Concrete, Inc, 676 F.2d at 1333. Finally, the Supreme Court in Griffith also stated that in each section 1985(3) case it must first be determined whether there is a constitutional source of congressional power to reach the private conspiracy alleged in the complaint. 403 U.S. at 104, 91 S. Ct. at 1790. As noted by the Griffin decision, section 1985 finds its authority under the thirteenth amendment and the commerce clause of the Constitution. 403 U.S. at 105-06, 91 S. Ct. 1790.

With the above standards in mind, the court concludes that the complaint fails to state a viable cause of action under section 1985(3). Apart from the conclusory statement

that defendants and unnamed "tribal authorities" have "conspired to violate Plaintiff's legal rights," Complaint, p. 5, ¶ 11, the complaint is devoid of any references to a conspiracy. Moreover, the complaint lacks any allegation of an invidiously discriminatory class-based animus. Presumably, a fair reading of this questionable pleading would be that each of the named defendants failed to protect plaintiff from the alleged deprivations of her liberty. See id. at p. 3, ¶ 2; id. at p. 4, ¶ 6. However, even these conclusory allegations do not state a claim of invidious discrimination because the court is left with pure conjecture: Is plaintiff alleging that she is the victim of conspiratorial discrimination because she is a Native American; a teenager; a formerly adopted child; deprived of a relationship with her former adoptive parents? The court declines to answer these hypothetical questions, let alone decide whether any of these categories would fall within the ambit of section 1985(3). The court therefore dismisses this portion of the complaint against all defendants[8] for failure to state a claim upon

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[8]With specific regard to the defendant Tribe, the court notes that, consistent with its analysis of plaintiff's section 1983 claim, since the purpose of section 1985(3) is to enforce the provisions of the Constitution -- here, the thirteenth amendment -- any such claim against the Tribe is beyond the reach of this statute and may only be examined under the provisions of the ICRA. See Santa Clara Pueblo, 436 U.S. at 54, 98 S. Ct. at 1675; R. J. Williams Co., 719 F.2d at 982; 25 U.S.C. § 1302; see, e.g., Runs After v. United States, 766 F.2d 347, 354 (8th Cir. 1985)(tribal governing body could not conspire within meaning of section 1985(3)); Means v. Wilson, 522 F.2d 833, 839-40 (8th Cir. 1975)(tribal government

which relief may be granted as well as for lack of subject matter jurisdiction.

(4) 28 U.S.C. § 1361:

Finally, the complaint relies on 28 U.S.C. § 1361 as a basis for subject matter jurisdiction. Section 1361 grants the district court original jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Presumably, the complaint asserts this jurisdictional basis solely against defendant BIA, the only federal agency/officer named as a defendant. However, this statute may not serve as an independent ground for subject matter jurisdiction even as to the sole federal defendant. See Starbuck v. City & County of San Francisco, 556 F.2d 450 (9th Cir. 1977). The statute does not confer upon the district court federal jurisdiction in this matter. Rather, section 1361 merely provides an additional remedy where subject matter jurisdiction already exists. See, e.g., Smith v. Lehman, 553 F. Supp. 1015 (E.D.N.Y.), aff'd, 689 F.2d 342 (2d Cir. 1982), cert. denied, 459 U.S. 1173, 103 S. Ct. 820, 74 L. Ed. 2d 1018 (1983). Thus, because no independent ground for subject matter jurisdiction has been successfully

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not proper section 1985(3) defendant, although members could be sued in individual capacity). Thus, even if the court were to conclude that plaintiff states a viable claim against the Tribe pursuant to section 1985(3), the court would still be without subject matter jurisdiction to grant plaintiff the relief she seeks against the Tribe.

asserted by plaintiff, the court cannot retain jurisdiction over this cause of action asserted against defendant BIA and must dismiss plaintiff's complaint and action in its entirety.

Because the court concludes for the reasons above that it has no jurisdiction in this matter, it is nonetheless compelled to make the following observations.

It is clearly apparent that Lalita is being emotionally and psychologically torn by several of the parties to this action as well as by others. It is distressing to observe the lengths to which some will go to exert and/or maintain control over Lalita. The brush with which I paint is intended to be broad. She deserves a reasonable adolescence, not treatment as a pawn by so many. Time -- Lalita's remaining adolescent years -- can never be recaptured. The situation almost cries out for a Solomon-like decision but because of the emotions involved, the court fears, figuratively to be sure, an acceptance of the king's suggestion rather than an appreciation or realization of the purpose of that decision. I hope I am wrong--the life of a child is too precious to have to withstand the emotional roller coaster upon which Lalita must feel she is riding. Is anyone really looking out for her interests or has that become too obscured in this apparently indeterminable process?--a question which the court hopes <u>all</u> will fairly examine.

IT IS ORDERED denying plaintiff's application for preliminary injunction for lack of subject matter

jurisdiction.

IT IS FURTHER ORDERED dismissing plaintiff's complaint and action as to all named defendants for lack of subject matter jurisdiction.

DATED this 16TH day of May, 1989.

Robert C. Broomfield
United States District Court

Copies to counsel of record

DEC -3 PM 2:17
JAMES N. CORBETT
CLERK SUPERIOR COURT
BY

ARIZONA SUPERIOR COURT

PIMA COUNTY

THURZA JOHNSON GOCLANNEY, Petitioner, vs. NORMAND GEORGE DESROCHERS and NADINE DESROCHERS, Respondents.	No. H-712 (PROSPOSED) FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED
Jan. 5 1982
JAMES N. CORBETT, Clerk
Deputy

This cause came on regularly for trial September 15, 1981, before the Court sitting without a jury. The Petitioner appeared in person represented by her attorneys, Ann R. Littrell and Robert C. Ericson. The Respondents appeared in person represented by Leighton H. Rockafellow. The Intervenor, White Mountain Apache Tribe, was represented by Robert C. Brauchli. Having heard the testimony and examined the evidence offered by the respective parties, and the cause having been submitted for decision, the Court, being fully advised herein, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Petitioner, Thurza Johnson Goclanney, is the natural mother of Lalita Johanna Johnson (aka Lalita Johanna Desrochers) who was born in Phoenix, Arizona on December 23, 1974.

2. The natural father of the child, Lowell Altaha, was not married to Petitioner when the child was born.

3. The child is an enrolled member of the White Mountain Apache Tribe.

4. Petitioner was a legal resident of the Fort Apache Indian Reservation in the State of Arizona during all times material to this action, including the period from December 1, 1976 until after March 1, 1977.

6. The Respondents were legal residents of Arizona during all times material to this action, including the period from

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December 1, 1976 until after March 1, 1977.

7. In June of 1975 the child was brought to Tucson, Arizona, as a protege of the House of Samuel, Inc. and was placed in the home of the Respondents.

8. In November of 1975, the Petitioner picked up the child in Tucson and took her back to the Fort Apache Reservation.

9. Shortly thereafter, Petitioner asked Respondents if they would again take temporary custody of Lalita. Respondents and a House of Samuel employee, Donie Green, brought the child back to Tucson in December, 1975.

10. The child has resided continuously with Respondents since December, 1975.

11. Petitioner married Hubert Goclanney in July, 1976. The couple moved to Texas the next month because their courtship and marriage had created problems on the reservation.

12. Petitioner and her husband obtained work in Dallas, Texas and rented an apartment there until February of 1977, when they returned to the reservation.

13. Petitioner left personal property on the reservation when she went to Texas. She did not register to vote in Texas or obtain a Texas driver's license. She and her husband listed Arizona as their legal residence on their 1976 and 1977 tax returns.

14. Petitioner never intended to give up her legal residence in Arizona or acquire a new legal residence in Texas.

15. On December 10, 1976 Donie Green telephoned Respondents and informed them that Judge Anna Lee Early of the White Mountain Apache Tribal Court was in Tucson to pick up the child, Lalita.

16. Donie Green also told Respondents that Judge Early had a tribal court order dealing with the custody of the child. (The Order of Temporary Custody, dated December 8, 1976, is identified as Intervenor's Exhibit No. 3.)

17. The tribal court order was never served on the Respondents.

R. 957

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18. After being informed about Judge Early and the tribal court order in the telephone conversation of December 10, 1976, Respondent Normand George Desrochers told Donie Green "when I hang up I am gone."

19. After his conversation with Donie Green, Respondent Normand Desrochers telephoned Dallas, Texas and obtained Petitioner's address.

20. Respondents flew to Dallas, Texas on December 11, 1976, with the intent to have Petitioner sign papers terminating her parental rights to the child.

21. By going to Texas after being advised of the tribal court order, Respondents were in effect fleeing in the face of that order and were attempting to avoid its possible effects.

22. After arriving in Texas, Respondents contacted an attorney in Fort Worth and set up an appointment for Monday, December 13, 1976. The attorney prepared for Respondents an "Affidavit of Relinquishment of Parental Rights by Mother" and an "Affidavit of Status" (these documents are indentified as Intervenor's Exhibit No. 1.)

23. After obtaining the documents from their attorney, Respondents went to Petitioner's apartment in Dallas and waited for Petitioner to return from work. When Petitioner arrived at the apartment, she and her husband read the documents identified as Intervenor's Exhibit No. 1.

24. The Petitioner reads with the comprehension of a third or fourth grader and could not have understood the meaning of the documents.

25. Respondents took Petitioner to the office of a Notary Public, James Horan. Petitioner's execution of the documents was acknowledged by Horan but was not witnessed by two witnesses. The signature of one of the named witnesses was supplied by Horan.

26. After the documents were signed, Respondents flew back

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to Tucson, where Respondent Normand Desrochers had employment as a plasterer.

27. Petitioner did not have any real contact with Respondents again until later in 1977.

28. Respondents returned to Fort Worth, Texas, on December 24, 1976, leaving their home, some of their children and all of their roots in Tucson.

29. Respondents listed the State of Arizona as their legal residence when they filed their income tax returns for 1976 and 1977.

30. The Respondents went to Texas to effect an adoption there, so as to avoid proceedings in the courts of Arizona and the White Mountain Apache Tribe.

31. On or about January 17, 1977, Respondents filed a joint petition in Texas seeking to terminate Petitioner's Parental Rights and to adopt Lalita. (Petitioner's Exhibit No. 11)

32. The petition filed by Respondents states that the identify of Lalita's father is unknown.

33. Respondents knew that the identity of Lalita's father was known to Petitioner.

34. In an order dated January 17, 1977, the Texas court ordered that a social study of the child and Respondents be conducted by Hal Monk. (Petitioner's Exhibit No. 11).

35. The Report of Social Study filed by Hal Monk (Petitioner's Exhibit 13) contains several misrepresentations by Respondents including the misstatements that the father of the child is unknown and that the Petitioner had told Respondents she was giving the child to Respondents and wanted them to keep her.

36. Petitioner was not notified of the Texas court proceedings and did not participate in them.

37. The issues of residence and the jurisdiction of the Texas court were not litigated in the Texas court proceedings.

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38. Petitioner did not tell Respondents she wanted them to have Lalita or that they could keep Lalita.

39. The Texas court issued an order labeled "Decree of Termination and Decree of Adoption" (Petitioner's Exhibit No. 12) on or about March 1, 1977.

40. Respondents returned to Tucson shortly after the Texas order was entered on March 1, 1977.

41. On or about February 23, 1979, Petitioner filed this Writ of Habeas Corpus requesting the Court to set aside the Texas order.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter and parties to this cause.

2. The Texas court lacked subject matter jurisdiction to enter the termination and adoption decrees (Petitioner's Exhibit No. 12) because the child, Respondents and Petitioner were all legal residents of Arizona, not Texas, during the period from December 1, 1976 until after March 1, 1977.

3. Respondents' act of representing to the Texas Court that they and the child were legal residents of Texas is extrinsic fraud which denied Petitioner and the child the protection of the laws of Arizona, their state of domicile.

4. The jurisdictional findings of the Texas court in the termination and adoption decrees (Petitioner's Exhibit No. 12) may be disregarded by this Court because the issues of residence and jurisdiction were not litigated in the Texas proceedings.

5. The Texas termination and adoption decrees (Petitioner's Exhibit No. 12) are void and will not be granted full faith and credit because they were entered without subject matter jurisdiction and as a result of extrinsic fraud.

DONE IN OPEN COURT this 5 day of January, 19 82.

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Jack T. Arnold
Jack T. Arnold
JUDGE OF THE SUPERIOR COURT

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damages were awarded any error would be harmless.

[7] During the trial counsel for Pima County had Mrs. Sheehan read to the jury a document which had not been admitted into evidence. The document referred to the authorization by the Sheehans permitting vaccination of Nuria. Since this document was not admitted into evidence appellant claims that there was misconduct on the part of counsel for Pima County in reading it to the jury and a reversal is mandated. We do not agree. Any objection to the testimony was waived by appellant's failure to object.

The judgments are affirmed and the cross-appeals are dismissed.

HATHAWAY, J., and J. RICHARD HANNAH, Superior Court Judge, concur.

NOTE: Judge BEN C. BIRDSALL having recused himself in this matter, Judge J. RICHARD HANNAH was called to sit in his stead and participate in the determination of this decision.

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Thurza Johnson GOCLANNEY, Petitioner/Appellee,

and

White Mountain Apache Tribe, Intervenor/Appellee,

v.

Normand George DESROCHERS and Nadine Desrochers, Respondents/Appellants.

No. 2 CA-CIV 4412.

Court of Appeals of Arizona, Division 2.

Dec. 14, 1982.

Rehearing Denied Feb. 4, 1983.

Review Denied March 8, 1983.

Appeal was taken from a judgment of the Superior Court, Pima County, Cause No. H-712, Jack T. Arnold, J., ruling that Texas courts did not have jurisdiction to grant an adoption. The Court of Appeals, Howard, C.J., held that under Texas law, Texas court lacked jurisdiction to enter adoption decree where natural mother, adoptive mother, custodian, and child were not domiciliaries of Texas.

Affirmed.

1. Adoption ⇐25

Under statute providing that any "irregularity" in adoption proceeding shall be deemed cured after one year from date that adoption decree is entered, lack of jurisdiction in court granting adoption decree was not "irregularity," and thus natural mother could attack jurisdiction of Texas court to grant adoption decree. A.R.S. § 8-123.

See publication Words and Phrases for other judicial constructions and definitions.

2. Adoption ⇐10

Under Texas law, Texas court lacked jurisdiction to enter adoption decree where natural mother, adoptive mother, custodian, and child were not domiciliaries of Texas. V.T.C.A., Family Code § 16.01.

3. Domicile ⇐5

Domicile of illegitimate child is determined by that of his mother.

Ann R. Littrell, Whiteriver, for petitioner/appellee.

Robert C. Brauchli, Whiteriver, and Anthony R. Cohen, Tucson, for intervenor/appellee.

Gaynes & Rockafellow, P.C. by Leighton H. Rockafellow, Tucson, for respondents/appellants.

OPINION

HOWARD, Chief Judge.

Petitioner/appellee filed for a writ of habeas corpus in the superior court. The

main and determinative issue is whether Texas had jurisdiction to grant the adoption by appellant of a child who was a registered member of the White Mountain Apache Tribe. The trial court made findings of fact which are binding on us unless they are clearly erroneous. *Olson v. State*, 12 Ariz. App. 105, 467 P.2d 945 (1970).

The findings and the record disclose the following. Appellee Thurza Johnson Goclanney is the natural mother of Lalita Johanna Johnson. Both Thurza and Lalita are enrolled members of the White Mountain Apache Tribe. Thurza was not married when Lalita was born.

In June 1975, Thurza agreed to place Lalita for temporary care with The House of Samuel, Inc., a Tucson-based Christian placement organization. The House of Samuel, in turn, placed Lalita with appellants. The placement was understood by all to be only temporary and revocable at any time by Thurza.

In November 1975, Thurza took Lalita from appellants and returned with her to the reservation. However, two weeks later she agreed to let appellant have Lalita for one year and Nadine Desrochers picked up Lalita in Cibecue, Arizona, on the Fort Apache Indian Reservation in December 1975.

On July 30, 1976, Thurza married Hubert Goclanney, an enrolled tribal member. They went to Dallas, Texas, the next month. Although they remained in Texas until February 1977, neither Hubert nor Thurza registered to vote there or obtained Texas driver's licenses. They left personal property on the reservation in Arizona and listed Arizona addresses on their 1976 and 1977 tax returns as their place of residence.

In the fall of 1976 Thurza asked her sister, Kathleen DeClay, to care for Lalita. Kathleen, who already had temporary custody of Thurza's other child, agreed to do so. In early December 1976, Kathleen requested the tribal court and council to help her obtain custody of Lalita. The tribal court entered an order on December 8, 1976, granting temporary custody to Kathleen DeClay pending a hearing.

On December 10, tribal officials and individual tribal members, including Kathleen DeClay, went to Tucson to retrieve Apache children who had been placed with the House of Samuel. While the tribal members were there, Donie Green, an employee of the House of Samuel, called appellants to tell them that tribal judge Anna Early had entered an order requiring them to return Lalita to the reservation. Normand Desrochers told Donie Green, "When I hang up I am gone." The next day, appellants flew to Texas with Lalita and their younger son.

After arriving in Texas, appellants contacted an attorney in Fort Worth and made an appointment for Monday, December 13. The attorney prepared an "Affidavit of Relinquishment of Parental Rights by Mother" and "Affidavit of Status." Appellants then went to Thurza's apartment, showed her the documents and told her they were temporary custody papers. Thurza tried to read the documents but could not understand them. Appellants drove Thurza to the office of a notary public, James Horan. Horan never read or explained the documents to Thurza, although he did ask if she realized she was "giving up" her child. Thurza signed the documents believing they were temporary custody papers. Her execution of the documents was acknowledged by Horan, but was not witnessed by two witnesses as required by Texas law. Thurza was not given a copy of the documents.

The day after the documents were signed, appellants, Lalita and the younger son flew back to Tucson. They then returned to Fort Worth eleven days later, leaving their home and some of their children in Tucson. On January 17, 1977, appellants filed a joint petition in Texas seeking to terminate Thurza's parental rights and to adopt Lalita. Thurza was never notified of the proceedings and did not participate in them. She and her husband returned to the Apache reservation in February 1977.

During their stay in Fort Worth, appellants leased a small one-bedroom apartment for themselves, their children and Lalita. Only their youngest child attended school

there. Although Normand Desrochers was unemployed during the entire stay in Fort Worth, appellants never attempted to rent or sell their Tucson home nor did they disconnect the utilities there. They kept open their Tucson bank account and continued to receive mail at their Tucson address. They also listed Tucson as their legal residence when they filed their 1976 income tax return in February 1977.

On March 1, 1977, the Texas court entered orders that terminated Thurza's parental rights and made appellants adoptive parents of Lalita. Appellants returned to Arizona a few days after the Texas adoption orders were entered.

Thurza filed a petition for a writ of habeas corpus and the tribe was allowed to intervene. Both parties requested, inter alia, that the custody proceeding be transferred to the tribal court pursuant to 25 U.S.C. Indian Child Welfare Act, § 1911(a), (b) and (c). After hearing the evidence the trial court found that the Texas court had no jurisdiction to terminate parental rights and grant an adoption and it transferred the proceedings to the tribal court.

[1] A.R.S. § 8–123 provides:

> "After one year from the date the adoption decree is entered, any irregularity in the proceeding shall be deemed cured and the validity of the decree shall not thereafter be subject to attack on any such ground in any collateral or direct proceeding."

Since the habeas corpus was filed more than one year after the date of the decree, appellants contend appellees cannot attack the decree. We do not agree. We need not decide whether Texas' curative statute, which provides for a two-year period, is the statute to be applied rather than Arizona's because it is clear that Arizona's statute applies to an "irregularity." The lack of jurisdiction here was not an "irregularity."

[2] The Texas jurisdictional requirement in adoption cases are found in § 16.01 of the Texas Family Code Ann. which states: "Any child *residing* in this State at the time the petition requesting adoption is filed may be adopted." (Emphasis added)

Must a minor child be a legal resident or domiciliary of Texas? That is the crucial issue here. Appellants argue that § 16.01 requires only the presence of the child in Texas or temporary residence at the most. Appellees argue that the statutes require that the child be domiciled in Texas.

Some courts, including Arizona, have taken the position that the residence within the state or county required of an adoptee or adoptive parent as the case may be, in order to effect an adoption, means legal residence or domicile. *In Re Adoption of Rials*, 220 La. 484, 56 So.2d 844 (1952); *In Re Webb's Adoption*, 65 Ariz. 176, 177 P.2d 222 (1947); *Brown v. Hall*, 385 Ill. 260, 52 N.E.2d 781 (1944); *Johnson v. Smith*, 94 Ind.App. 619, 180 N.E. 188 (1932); *Foster v. Waterman*, 124 Mass. 592 (1878). The Restatement of Conflicts (Second) § 78 is in accord with the foregoing cases:

> "A state has power to exercise judicial jurisdiction to grant an adoption if
>
> (a) it is the state of domicile of either the adopted child or the adoptive parent, and
>
> (b) the adoptive parent and either the adoptive child or the person having legal custody of the child are subject to its personal jurisdiction."

Also in agreement with the foregoing cases and the Restatement view is Goodrich & Scoles, Conflict of Laws, 4th Ed. § 146 where the authors state that if the parties are not all domiciled in the same state an adoption can probably be accomplished at the domicile of either the adopting parent or the adoptive child by a court having the child or, if a minor, its legal custodian before it. We conclude that Texas requires that the child be domiciled in Texas.

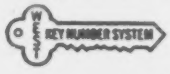
[3] Lalita's domicile might, depending on several factors, be determined either by the domicile of appellant, of Lalita's mother Thurza,[1] or Lalita's aunt, Kathleen DeClay.

1. The domicile of an illegitimate child is determined by that of his mother. *In Re Estate of Moore*, 68 Wash. 792, 415 P.2d 653 (1966); 25 Am.Jur.2d, Domicile § 69.

It is not necessary, however, to decide which of these persons determined Lalita's domicile because none of them were, according to the findings of fact and conclusions of law made by the trial court, domiciliaries of Texas.

Affirmed.

HATHAWAY and BIRDSALL, JJ., concur.



135 Ariz. 243

Dan CRACCHIOLO and Joseph Cracchiolo, Plaintiffs/Appellees,

v.

STATE of Arizona; State Land Department of the State of Arizona; Joe T. Fallini, State Land Commissioner; Arizona State Department of Health Services; James E. Sarn, M.D., M.P.H., Director of the Department of Health Services; the City of Sierra Vista, Defendants/Appellants.

No. 2 CA-CIV 4435.

Court of Appeals of Arizona, Division 2.

Feb. 3, 1983.

Lessees sought to enjoin the State and the city from going upon the land as to which the lessees enjoyed grazing rights. The Superior Court, Cochise County, Cause No. 40463, Richard J. Riley, Former J., entered a temporary injunctive order, and city and State appealed. The Court of Appeals, Birdsall, J., held that where lessees, who could use property only for grazing in any event, were neither in possession nor entitled to possession when their complaint was filed, and institutional taking by the Department of Health and sublease thereafter to the city for purpose of operating a water treatment plant were never declared void, lessees, who had an adequate remedy at law in form of money damages, were not entitled to an equitable remedy against State and city in form of a preliminary injunction which would not preserve the status quo.

Order vacated.

1. Injunction ⇐5

A mandatory injunction can direct that an accomplished fact be undone.

2. Eminent Domain ⇐274(1)

Institutional taking of land by the Department of Health and a sublease to the city for the purpose of operating a water treatment plant on that land, though accomplished acts, could be enjoined if justified by the facts and law.

3. Eminent Domain ⇐274(1)

Although lessees of a state grazing lease might be able to eventually show their right to possession, where lessees, who could use property only for grazing in any event, were neither in possession nor entitled to possession when their complaint was filed, and institutional taking by the Department of Health and sublease thereafter to the city for purpose of operating a water treatment plant were never declared void, lessees, who had an adequate remedy at law in form of money damages, were not entitled to an equitable remedy against State and city in form of a preliminary injunction which would not preserve the status quo.

4. Injunction ⇐136(3)

Rule that trespass of a continuing nature, of such constant and frequent recurrence that no redress can be had at law, constitutes irreparable injury justifying temporary injunctive relief is applicable only if parties are entitled to possession and injunction preserves status quo by protecting that possession.

5. Injunction ⇐114(3)

It was not necessary to add beneficiaries of trust lands, the schools, as parties in action to enjoin the State and the city from going upon those lands in violation of grazing rights of lessees inasmuch as the State,

REPORT TO THE SELECT COMMITTEE ON INDIAN AFFAIRS

ON THE INVESTIGATION OF THE FEBRUARY 7, 1989

INCIDENT AT WHITE MOUNTAIN APACHE INDIAN RESERVATION

Peter S. Taylor, Senior Counsel
Select Committee on Indian Affairs

May 19, 1989

On February 7, 1989, the Chairman of the Civil Rights Commission, William Allen, accompanied by Dr. Barry Goodfield, a consultant to the Commission, two U.S. Marshals, and two video camera crews, one from NBC and one privately retained by Dr. Goodfield, entered the White Mountain Apache Reservation for the purposes of interviewing a 14 year old Indian girl, Lalita Altaha, apparently to determine her wishes in the matter of a custody dispute between prior putative non-Indian adoptive parents, Normand and Nadine Desrochers, and the natural Indian parents, Lowell and Thurza Altaha, with whom she has resided for the past year.

The child was asked to step out of a school bus and was then interviewed by Commissioner Allen and Dr. Goodfield before television cameras in a public school yard and then by Dr. Goodfield in a private vehicle while she was being driven to her home some 14 to 18 miles away. The girl was released to her mother, Thurza Altaha, following a verbal confrontation between Mrs. Altaha, Dr. Goodfield and Commissioner Allen. The incident resulted in the arrest by state authorities of all in the Allen party except the two U.S. Marshals.

This incident received widespread publicity and led to the White Mountain Apache Tribe urging a Congressional investigation of the matter. This report will provide a summary of our investigation.

Monday - March 6, 1989

On March 6th, Eric Eberhard, Minority Staff Director, and I proceeded to Whiteriver, Arizona, the tribal headquarters, to interview a number of witnesses who might have relevant information regarding the February 7th incident. That afternoon we met with a number of individuals at the local Motel/Restaurant, interviewed one witness at tribal headquarters, reviewed certain psychological reports, and reviewed the NBC tapes shown on air and tapes of certain local broadcasts.

Law Enforcement Officers:

Present at this meeting were Andrew Kane, Chief of the White Mountain Apache Police Department; Vincent Craig, Justice Commissioner of the White Mountain Apache Tribe; Vince Hubbard, BIA Criminal Investigator; and Doug Hopkins, FBI Special Agent, Lakeside, Arizona. These persons were interviewed by both Eric and I at the Motel Restaurant upon our arrival Monday afternoon. Essentially they confirmed what had already been publicly reported. In addition, Chief Kane did obtain for us "offense reports" of the Gila County Sheriff's Office and the Arizona State Department of Public Safety. The facts are as follows.

About 4:00 p.m., Feb. 7th, the tribal police office received a telephone call made at the request of Thurza Altaha advising that a large body of men traveling in three vehicles had abducted her daughter, Lalita, from a school bus at Alchesay High School, and that she was being harassed by newsmen. An officer was dispatched to interview Mrs. Altaha. The initial report from this officer failed to clarify whether the child had been returned to her parents or was still in the custody of the group of men. An APB was put out and assistance was requested of the Gila County Sheriff's Office, the Arizona State Department of Public Safety, and the Globe Police Department on what was believed to be a possible kidnapping.

According to the Gila County Sheriff's Office "Offense Report" and the comparable report of the Arizona State Department of Public Safety, about 5:45 p.m., the Arizona State Police observed one of the vehicles passing their lookout position. They pursued the vehicle (ultimately all three vehicles) and placed all of the occupants under detention, described in the report as an "arrest". There were ten persons in the group. The two U. S. Marshals were not among those detained. Commissioner Allen, Dr. Goodfield, and an NBC camera crew were among the group. All but one of the group (the French citizen) are shown as having been arrested, but none were formally "booked".

Commissioner Allen and Dr. Goodfield took the lead in explaining their purpose and activities, and how they had been accompanied in their activities by two U. S. Marshals. The Marshals were contacted and did come into the Gila County Sheriff's Office about 8:30 p.m. that evening. According to the Sheriff's "Offense Report" (pg. 3):

> "While making arrangements for transportation (of the subjects to the Gila County Sheriff's Office), Dr. Goodfield advised that he did not know where the Marshall's were staying in Show Low, but he did have a telephone number. Upon arriving at our office, I called to Show Low and talked to U. S. Marshall James

> R. Skaggs #1921, who verified the story. Marshall Skaggs advised they would be enroute to our office. * * * At about 2030 hours, the Marshals arrived, relayed that they were on the reservation on a fugitive detail when they ran into the Commissioner and Dr. Goodfield, who Marshall Skaggs knew. Dr. Goodfield told them they were looking for the Johnson girl, but had gotten lost, so the Marshals took them to the Middle School, to interview the girl, but she had just left on the school bus. They followed the bus to the High School, and approached her, told her that they wanted to interview her, which she agreed."

The nature of the involvement of the U. S. Marshals Service in this incident was not known until after the arrest of the Allen party. On page 4 of his 13 page report, CI (Criminal Investigator) Hubbard notes that on the very night of this incident while everything was still up in the air and being sorted out, CI Daniel Hudspeth of BIA advised him that earlier that day he had met with two U.S. Marshals who were on the reservation in connection with two fugitive warrants. On page 7 of this report, it is noted that CI Hudspeth called the U.S. Marshal's Office in Phoenix and was told their office was not involved in the incident at all -- the two Deputies that were around Whiteriver were there for the purpose of serving two federal warrants and nothing else.

Marshal Skaggs and Dr. Goodfield had previously met and were acquainted with each other. On page 9 of CI Hubbard's report there is a lengthy explanation given by CI Hubbard as supposedly recounted to him by Marshal Skaggs, explaining why they had participated in this incident without prior notification to the tribal or BIA police. A part of this explanation follows:

> "Deputy Skaggs then said the Chairman, Bill Allen, of the U. S. Civil Rights Commission, had requested their assistance in locating the girl, Lalita Altaha, in Whiteriver. He wanted to interview the girl without any interference from anyone. The plan was to go in unannounced, make contact with Lalita, and see if she was willing to be interviewed. If so, they would do the interview and if she said no, they would have packed up and left without the interview. The role of the Marshals being there was to make sure nothing went wrong and to witness the event. The Chairman was with a guy that Skaggs had worked with before, a Dr. Barry Goodfield.

In addition to their prior acquaintanceship, it is also noteworthy that Dr. Goodfield knew the Marshals would be in Show Low and that he had a telephone number. The circumstance of

their simply bumping into each other in Whiteriver without any prior contact was refuted in a later interview with Marshal Skaggs. (See interview with Marshal J. R. Skaggs, March 9th).

Whatever the circumstance, Chief Kane and CI Hubbard arrived at the Gila County Sheriff's Office shortly thereafter, and after conferring with the various officers, agreed to the release of the group.

Social Workers:

Immediately upon the transfer of Lalita back to the reservation in January of 1988, Lalita and her family began counseling. The counselor was Dr. Mellissa Ring, a PhD in Clinical Psychology. At lunch we were told that the family had actually had at least one meeting with Dr. Ring even before Lalita was transferred back to the reservation. It appears the primary purpose of the counseling was to assist Lalita and the family in their adjustment to each other.

It should be noted that Lalita or "L.J." has repeatedly stated she wants to be left out of whatever fights there are between her natural and her foster parents. She does not want to have to choose -- does not want to hurt either side.

In a file separate from Dr. Rings there is a file on a pleading filed by the Desrochers in the White Mountain Apache Tribal Juvenile Court on May 9, 1988, challenging the fitness of the Altahas to have custody of Lalita and making various charges. As a result of this pleading, the Court ordered a home visit by a social worker. The social workers report to the court states that L.J. is well adjusted. She still misses her adoptive parents but does not want to have to choose between them and the Altahas. She lives in a three bedroom house, with a kitchen, bath, laundry and living room with a fireplace. She has a brother two years older.

School Principals:

Gene Nelson, Principal
Whiteriver Middle School

Mr. Nelson is a non-Indian man, I would guess in his late fifties. He has been in the Arizona public school system for 21 years, most of which seems to have been spent around the White Mountain Apache area. The school is an Arizona State public school.

We have Mr. Nelson's statement to Claudine in our files. In our interview Mr. Nelson basically reiterated the contents of that statement. He stated that his first knowledge of the incident was when four men entered his office, one a U. S.

Marshal, who produced his shield and I.D. and wanted to know where Lalita was -- they wanted to see her. School was just letting out and Mr. Nelson pointed out the window toward a bus that Lalita was boarding. It was then he noticed a man outside with a video camera.

Nelson stated that the men left in a state of some agitation in order to catch the bus when it stopped at Alchesay High School, a short distance away. Among other things, they ran through children, stopped busses so they could get between them to their own vehicles, and left the parking area spinning their tires and spewing gravel. He considered their conduct negligent, and if he had been a police officer he would have ticketed them.

An important point made in Mr. Nelson's statement relates to who can see a child on school premises. It should be noted that the Whiteriver Middle School and the Alchesay High School are both public schools of the State of Arizona. They are thus governed by the laws, regulations and policies of the State. Mr. Nelson stated that as a general rule a "consent form" must be completed before a child can be removed from the premises. However, police and child protective services have authority to interview and even to take a child from the school premises. However, the police are usually very cooperative and sign forms before ever removing a child from the school. This is true of the tribal police, the BIA police, FBI and even the Marshal's.

In terms of speaking to a child, this must be done in the presence of himself or someone else. This is to ensure that a child is given his rights and that someone can notify the child's parents. In his statement to Claudine he indicates that in this case "they would have allowed these people to speak to Lalita, but would not have allowed them to film her." As I recall, in speaking to us, Mr. Nelson stated that if he had known it was a "civil" matter, he would not have allowed them to talk to Lalita without one of the parents being present.

Television Tapes:

At the conclusion of the day, Eric and I reviewed the television tapes in possession of the tribe. These consist of the NBC news tapes played nationally on television, and a series of films from local Phoenix stations. Two important facts became known.

First, Goodfield is shown stating to Lalita that there is no way he is going to leave her on the reservation if she doesn't want to be there. If she will walk up the road and hold up her thumb as they pass her by, he will treat that as simply thumbing a ride and will take her off the reservation. Commissioner Allen is shown a short point later speaking to Dr. Goodfield through

Goodfield's car window telling him that he cannot take Lalita off the reservation because that would be kidnapping.

Second, some of the local film footage showed shots of the Desrochers when they turned themselves in to Arizona authorities in January of 1988. Dr. Goodfield was with them at that time and gave substantial interviews. This was our first knowledge that Goodfield had been involved with the Desrocher case for a substantial period of time. current event.

TUESDAY - March 7, 1989

School Principals:

Tracy Carrington, Principal
Alchesay High School

Mr. Carrington is a non-Indian man about 40 years old, and has been in the Arizona school system for some time.

We also have a statement from Mr. Carrington that was given to Claudeen Arthur. Mr. Carrington is principal of the first school Commissioner Allen and his party went to. Mr. Carrington advised me that he would have little to add to Mr. Nelson's account --that in fact he did not see as much as Mr. Nelson.

Carrington stated that around 2:45 p.m. on Feb. 7th, four men arrived at his office seeking Lalita. One of the men identified himself as a U. S. Marshal and showed proper I.D. Carrington checked his records and could find no record for Lalita. He indicated to them that they should check at the Whiteriver Middle School. In response to a question, one of Carrington's employees indicated that she did know the parents of Lalita and in fact was related to them. She stated that Thurza was employed at the Rainbow Treatment Center. Rather than seek contact with Thurza, one of the men told Carrington and his staff not to call anyone for 30 minutes concerning this matter. Carrington said this was not unusual for law enforcement officials to do. No newsmen or camera men came into his office.

Mr. Carrington confirmed what Mr. Nelson had said about public school policy regarding law enforcement personnel interviewing students on school property and removal of such students. It is not uncommon for law enforcement officials to come to the school to interview students. However, as a matter of procedure, law enforcement officials go through the principal's office and advise them of their purpose. The Principal will usually sit in on any meeting with the students to be sure their rights are protected. As a matter of procedure a law enforcement official will not remove a child without first signing a form. There was a State Attorney General's Opinion on this issue a few years back confirming the right of law

enforcement officials to conduct these interviews and to remove children.

Mr. Carrington said that as a general practice, whenever a police officer other than a tribal officer appears to see a student, he is accompanied by a tribal officer. This obviously was not done in this case.

Carrington reaffirmed what Nelson said yesterday regarding discussions with kids on civil matters. He stated that "Had we known it was a 'civil rights' question, we would not have allowed questioning without the parents being present." As it was, of course, the interview took place outside on the school grounds without any teacher present and without the consent of any school official.

Carrington mentioned the fact that a school bus monitor at the Alchesay High School where the interview with Lalita occurred, a Mr. Alexander Berech, did see the group talking with Lalita out in the parking lot. However, he did not report any excessive disruptions and indicated that no one seemed particularly upset. Apparently he was not close enough to the group to ascertain what was going on.

Carrington stated that about 300 students are bussed daily. About 80 % of the students are bussed to school. Ten busses line up at the Whiteriver School to pick up the elementary and middle school kids; then they come over to Alchesay to pick up the high school students. It is quite a lengthy cavalcade, so it is possible Berech was far enough removed to be as uninvolved as reported.

School Bus Driver:

Gillispie Childs
Bus Driver

Mr. Childs is an Indian man, presumably White Mountain Apache, with some grey in his hair and very neat in appearance. Like Mr. Nelson, Mr. Childs has been in the school system for 21 years, many of those years working as a school bus driver. Mr. Childs is soft spoken, seems almost a little shy, and I think tends to under-emphasize what he may observe and not say anything more than what he is certain he actually did observe.

Mr. Childs was the driver of the bus upon which Lalita was riding at the time of the incident. His first knowledge of anything relevant was when he was parked at the Whiteriver Middle School waiting to take on children. His was the second of ten busses waiting in a line. His bus is medium size with a carrying capacity of about 20 students. He had just boarded his elementary and middle school students (5 of them) including

Lalita and the busses were getting ready to move out.

A white man passed in front of his bus and came around to the driver's window and asked a question of him that he could not understand. He did not know who this man was but described him as about 5' 10", medium build, age in the 40's, light hair (blondish or white) a little on the long side. He did not understand what the man had asked him, so he just replied "No, I don't think so." and began to pull away. The busses were held up a moment or two by the white men in this process, but they all pulled away and proceeded to Alchesay High School. He did not perceive any particular excitement at this time and, since he was driving away, did not observe their manner of departure from the Whiteriver School to pursue the busses.

As he was pulling away and proceeding toward Alchesay High, Lalita called to him and asked "Who was that? What did he want?". Mr. Childs told her he couldn't hear him and didn't know.

At Alchesay the busses again formed in a line ten long. Mr. Childs was to pick up another 8 children at this school for a total passenger load of 13 students. As he was parked with his front boarding door open, the same white man came over to the bus and poked his head through the door and asked if Lalita was there. Mr. Childs stated that Lalita (who he knew as L.J.) responded and got up and departed from the bus. The white man did not actually come onto the bus -- just poked his head through the door.

When Lalita got off the bus, she met with the group of men about 15 feet away from the bus. There were film cameras running. Although the group was only a few feet away, he was unable to hear what they were saying, and described their speech as being about conversational level -- too low to hear from his distance. He described them as being "in a huddle" with Lalita. The surrounding students did not seem particularly disturbed.

Mr. Childs stated that he did observe a big white car parked about 100 feet away from his bus. He did not notice the accompanying van or automobile. The group started walking toward the white car, with the camera crews walking backward in front of Lalita and the other men taking pictures of their movement toward the car. They were not hurrying, and were still talking with the film crew filming. They passed behind another bus and Mr. Childs could not see them as they moved further toward the car.

Mr. Childs stated that the next thing he saw was L.J. (Lalita) walking down the road alone. (NOTE: This would be consistent with the NBC film footage where Dr. Goodfield instructed Lalita to walk toward the road and pretend to be thumbing a ride when they passed by.) The kids on the bus

called to Mr. Childs to pick her up.

After Mr. Childs had gotten his children aboard the bus, he proceeded down the road and saw the white car parked in the roadway. Another bus was in front of him and pulled around the white car and proceeded on. Mr. Childs slowed his bus almost to a dead stop. He saw Lalita next to the door in the front seat on the passenger side. There was only one other person in the front -- the driver of the car. He is not sure who that was. He did not notice if there were any people in the back seat.

Mr. Childs pulled around the white car at almost a dead stop and motioned to Lalita to see if she wanted a ride -- wanted to get on the bus. Lalita saw him and waived him on.

Mr. Childs has no further knowledge of this incident. He did volunteer that he considered Lalita to be different from the other students -- always very polite and courteous.

Childs also stated that Lalita seemed to be out-going and that she got along with other students. Mr. Childs simply volunteered this without my having asked anything about it.

At the conclusion of the interview I took Mr. Childs into Chairman Reno Johnson's office so we could review some of the TV film footage of the incident. He had not seen it. He had no difficulty in identifying Dr. Goodfield as the man who had approached his bus at Whiteriver Middle School and who poked his head in the door at Alchesay High School.

Thurza Altaha -- Mother of Lalita:

Mrs. Thurza Johnson Altaha
Mother of Lalita (L.J.) Altaha

When I returned to the office from viewing the tapes with Mr. Childs, I found Mrs. Altaha sitting in the outer office. I started the discussion by telling her who I was -- who I worked for and just what our interest was. In particular I stressed that our Committee was not concerned with the custody of Lalita -- that those were legal issues that had been heard by the courts and that might still be involved with the courts -- but they were issues that were not the proper business of the Committee.

I asked Mrs. Altaha to tell me what happened on February 7th when Commissioner Allen was out at the reservation. Mrs. Altaha said she was at work in Whiteriver about 4:00 p.m. in the afternoon, and in fact was in the middle of a staff meeting, when she received a telephone call from her son Johnny advising her that Lalita had been taken away by a large number of men.
Johnny is two years older than Lalita (thus about 15 or 16) and is a student at Alchesay High School. He apparently observed the

incident at the High School, and when the people left with Lalita he ran to the principals office and called Thurza at work.

Thurza said she immediately left the staff meeting saying "They've got my daughter" and ran and got in her pick-up truck. She drove to Alchesay High School and got Johnny and set out in hot pursuit toward Cedar Creek. Cedar Creek is 14 to 18 miles out of Whiteriver along the main highway headed East toward Globe. She said she was driving very fast, 70 or 75 miles per hour, trying to catch the caravan. She had no idea what the people were doing but was pretty sure they were attempting to take Lalita off of the reservation and probably return her to the Desrochers.

Some miles out of town she caught up with the group. She told Johnny to take out a pencil and paper and when she passed the group, take down their license numbers. She did pass the three vehicles and Johnny did get their license numbers.

She then told Johnny that when they got to Cedar Creek, she was going to pull off the road near a relatives house and he was to run into the house and call the tribal police and give them the numbers. She did do this and Johnny apparently did run in the house and make the call, as instructed. This obviously was the first contact with the police and set in motion the rest of the police events of the evening.

In the meantime, when she pulled off at Cedar Creek, the following caravan also turned in. She got out of the truck and Dr. Goodfield and Commissioner Allen also got out of their vehicles. I don't know who else got out, but I would assume most of the party. The camera men definitely got out and started filming again. Thurza hollered at her to get into the pick-up. Dr. Goodfield approached her and said he wanted to talk to her. (She indicated to me that she did shake his hand. It turned out that she had previously met Dr. Goodfield.) Commissioner Allen also said he wanted to talk to her.

She told Goodfield and Allen she didn't want to talk to them. She wanted her daughter back. She again hollered at L.J. to get in the pick-up. At some point Lalita got out of the car and Dr. Goodfield and Commissioner Allen went over to her. Dr. Goodfield put his arm around her and asked her to stay with him-- to go away with him. Thurza says he said something to the effect she didn't have to stay here -- didn't have to stay with the Altahas. Thurza claims that at that point she thought she heard Goodfield purport to give Lalita money. Lalita denied he gave her money. He did, however, give her a note with his telephone number on it, and also gave her the Notice of Deposition set for the following day, along with the material from the Desrochers. Lalita was crying and Goodfield kept putting his arm around her trying to get her to go away with him.

Eventually Lalita did get in the pick-up and they left.

Dr. Goodfield:

I asked Thurza if she had ever met Dr. Goodfield before. The answer was very surprising. She told me that she had known him --that the first time she met him was with her lawyer, Hugh Hegyi, following a scheduled appearance for a deposition in Gallup in November of 1988. The Altahas were unable to keep the appointment due to a heavy snow fall that blocked the highways. That day Dr. Goodfield indicated to the Altaha's attorney, Hugh Hegyi, that he wanted to meet with her and her husband and Hugh Hegyi. The Altahas agreed to meet at Snow Flake, Arizona -- just the four of them. This meeting took place in November, 1988, the day after the aborted Gallup deposition.

At the meeting Dr. Goodfield stated that he was a divorce counselor. He stated that Thurza was hurting her daughter and wanted to talk about the Altaha's agreeing to let the Desrochers have custody of Lalita. He wanted to set up a meeting with the Desrochers. The Altahas did not agree to such a meeting, but apparently did say they would talk about it.

The surprising thing about this is that not one person had mentioned that Dr. Goodfield had had any involvement with this case other than his involvement at the very outset in January of 1988 when the Desrochers turned themselves in. I don't believe any tribal officials know that this meeting took place.

THURSDAY - March 9, 1989

United States Marshal Service:

J. R. Skaggs
United States Marshal
Phoenix, Arizona

On Thursday, March 9th, I had a one hour interview with Marshal Skaggs. He is a young man in his early to mid-30's, very articulate and pleasant. He has been on the Marshal's force about two years, but served on Yuma Arizona Police Force for 12 years.

Marshal Skaggs shared with me his incident report on the occurrence of February 7th -- he allowed me to review it but did not feel at liberty to give me a copy. I shared with him my copy of BIA Criminal Investigator Hubbard's report, but did not give him a copy. He stated that Hubbard's report seemed accurate to the best of his knowledge. His report and our conversation answered many questions.

Marshal Skaggs first came to know Dr. Barry Goodfield in

June of 1988 when Dr. Barry Goodfield was doing interviews in connection with the Keetso case involving the Navajo Tribe. Skaggs spent five days with Goodfield at that time providing protective services to him as a consultant with the Civil Rights Commission. This protective service had been ordered or sanctioned by the D.C. Marshal's Headquarters Office in Virginia. He and Goodfield spent five days touring the Navajo reservation, and ultimately Durango, Colorado where the Desrochers were interviewed.

Among other things he and Goodfield did was to go out to see the Keetso grandmother for an interview. Goodfield was traveling with his own camera crew and video taped all his interviews. Grandmother Keetso was living out in the country where she had a house and a separate hogan for religious purposes. When they arrived for her interview she was involved in some sort of ceremonial dance. I asked Skaggs if any notice had been give her about an interview. He said he didn't know -- his only job was to assure protection -- but she did not seem particularly disturbed by Goodfield showing up. There was apparently quite a lengthy interview, all of it video taped.

At some point in this five day meandering, they wound up in Durango, Colorado, where the Desrochers were located. At this point Goodfield held himself out as a representative the Civil Rights Commission. (At a later point he held himself out as an expert witness for the Desrochers in their custody claim against the Altahas. See interview with Hugh Hegyi, attorney for the Alathas.). He interviewed the Desrochers, again accompanied with a full video filming. Again, Skaggs did not pay particular attention to the interview. He did state that the Desrochers made a nice impression and he felt very sorry for them losing a child they had cared for so long.

Following this episode, he did not have any formal contact with Goodfield until December of 1988. Goodfield did travel through Phoenix now and then and would call him just to say hello. They had become friendly but were never able to get together.

On December 22, 1988, Marshal Skaggs received a call from Dr. Goodfield advising Skaggs that there would be a follow-up investigation by the Civil Rights Commission "on a child custody case.". On January 17, 1989, Commissioner William Allen called the Marshal's office in Phoenix to discuss security arrangements (I don't know if he talked to Skaggs, or his supervisor, Tom Morrisey)

On January 24, 1989, Marshal Morrisey advised Skaggs that the Marshal's service (apparently Skaggs) would provide assistance on the proposed further investigation. This was based on instructions of Deputy Director John Twomey from Marshal's

Headquarters in Arlington, Virginia. This protective service was obviously arranged by Commissioner Allen. Apparently no specific date was established.

On February 3rd Commissioner Allen called and left a message indicating that protective services might not be needed. Over the next three days, from Feb. 3 through Feb. 6 there were several calls from either Allen or Goodfield indicating that protective services might not be needed. Finally they did set a date for February 7th. This was based on a call from Goodfield, but it still left unclear whether any services were wanted or needed. Nevertheless, Goodfield did want to establish a rendevouz with the Marshal's service (Skaggs) and they agreed to meet at a small store at the bridge that crosses Salt River Canyon. Skaggs was still not sure if he was supposed to accompany the party or perform any services.

At this point Skaggs had spoken to his supervisor, Morrisey, and arranged for himself and Marshal R. L. Morris to be on duty on the White Mountain Apache Reservation for warrant duty, i.e., to serve or execute two felony warrants on persons wanted in that location. Skaggs indicated that this had been arranged before he knew whether any duties were expected of him by the Civil Rights Commission.

At the appointed time, Skaggs and Morris appeared at the Salt River Canyon and made contact with Commissioner Allen, Goodfield and party. They were informed that the party had gotten lost and wound up at Roosevelt Lake and they asked for assistance.

It was at the time of this rendevouz that Skaggs and Morris were told that the interview was to be with an Indian girl involved in a custody battle. Commissioner Allen assured them that their only purpose was to see if the girl would voluntarily agree to an interview, and if she would, then to conduct the interview. At this point, Allen, Goodfield, et al., were running 2 1/2 hours behind schedule. This is important because it led to the fiasco of arriving just as school was letting out. Thus, even if it was so intended, it was not possible to follow normal procedures as was outlined by the two principals interviewed (Nelson and Carrington) and as understood by Marshal Skaggs.

From here the party proceeded first to Alchesay High School where they were directed by Principal Carrington to the Whiteriver Middle School, where in turn they talked to Principal Nelson just as the busses were pulling out for Alchesay High.

Once at Alchesay High, Dr. Goodfield got Lalita to come off of the bus and the interview began. At this point, both Marshal Skaggs and Marshal Morris stationed themselves a short distance away (10 feet) to assure that the party would not be bothered.

Neither Skaggs nor Morris heard the actual interview -- they were paying attention to security.

The next thing Skaggs realized, the girl, Lalita, was walking away toward the road. At that point he wondered what in the day lights was going on. Morris was apparently having similar thoughts. Everybody re-embarked in their vehicles, with Commissioner Allen joining the Marshals in their Chevrolet sedan. Goodfield was in the "big white car" with a film crew. The NBC crew was apparently in the rented van.

Within a very short distance the white car stopped and Lalita got in. Skaggs asked Allen what the heck was going on and Allen replied that "they were just taking her home." (NOTE: The NBC tape shows Allen telling Goodfield they cannot take the girl off the reservation -- that would be kidnapping. Goodfield is also shown on the tape telling Lalita that if she would walk to the road and thumb a ride, they would take her off the reservation.)

The party started down the road toward Cedar Creek, a distance of 14 to 18 miles. Skaggs and Morris began to consider the situation and talked to each other, apparently in Allen's presence, about what to do if they did not stop at Cedar Creek. At first Skaggs was not sure if they stated that if the party did not stop at Cedar Creek they would place the entire group under arrest for kidnapping. Later he recalled that he and Morris did have such a conversation while they were enroute. He is quite clear that he and Morris would have stopped the cars and arrested the entire company, if the party had not stopped at Cedar Creek.

Part way to Cedar Creek, the white car pulled over to the side of the road and Goodfield got out. I am not sure whether Commissioner Allen got out of the Marshal's car also. Whatever the case, the two did talk and then got back in their respective vehicles. Allen again assured the Marshals that they were just taking the girl home.

At some point Mrs. Altaha passed them in her pick-up truck. Skaggs remembers the girl pointing at the truck as it passed them. As the party reached Cedar Creek, the Altaha truck had been pulled to the side. Skaggs remembers Goodfield, Allen, and the others disembarking; the film crews again filming; and that Goodfield extended his hand to Mrs. Altaha and they shook hands. The next thing he knew was that Lalita got into her mother's truck and everyone pulled away.

At this point Skaggs and Morris departed for Show Low and Allen, Goodfield and party headed for Globe. It was there that they received the call in Show Low advising them of the arrest of the party, and from there they immediately proceeded to Globe.

FRIDAY - March 10, 1989

The Altaha's Attorney:

Hugh Hegyi, Esq.
DNA People's Legal Services
Window Rock, Arizona

On Friday I spoke twice with Hugh Hegyi by phone. We spoke for at least an hour and a half. Mr. Hegyi represents the Altahas in a civil action against the Desrochers for damages for the tortious interference with the Altahas custodial rights. He has also represented the Altahas on other matters related to the issue of custody of Lalita. I was particularly interested in what he could tell me about the meeting with Dr. Goodfield that Mrs. Altaha had mentioned to me that had happened about two months ago, and what he could tell me about Dr. Goodfield himself.

Early history:

Hugh told me that the original attorney on the case was David Frank of DNA. Frank is now with the Navajo Attorney General's Office. Hegyi has two file drawers full of material on this case. The suit to vacate the Texas adoption decree was originally filed in 1979. The Superior Court of the State of Arizona in and for Pima County, of course, entered an order in December of 1981, formally filed on January 5, 1982, to vacate the Texas decree. It was at this time that the Desrochers took off with Lalita and went into hiding.

At a later point the case of Altaha v. Desrochers, No. 213979, seeking damages for tortious interference with parental rights, was filed by Thurza Altaha against the Desrochers. One purpose of the suit seems to have been to get some discovery to try to locate the Desrochers. They have at least two adult children living in the Tucson area, and Mrs. Desrochers' mother and sister apparently also live there. This suit was filed in 1984. The attorney for the Desrochers at that time was a man by the name of Rockafellow. His ex-partner, Alex Gaynes of Tucson, is now representing them.

It was not until 1984 that Hugh Hegyi got involved in this case. David Frank and Hugh Hegyi apparently attempted to depose the Desrochers relatives but for some reason they were unable to do so. This could have had something to do with service of process. Obviously the Desrochers had not been personally served since they were in hiding. Efforts at service by publication or some other means of constructive service were also unsuccessful.

Hugh advises that at all times after the January 5, 1982, judgment vacating the Texas decree, Mrs. Altaha and her attorneys were engaged in attempts to locate the Desrochers. Among other things, they contacted the Sheriff's Office and local police in the Tucson area, and the County Attorney's Office, seeking help. The local police or sheriff's deputies made some initial efforts by contacting the Desrochers' relatives but they denied knowledge of the Desrocher's whereabouts. The police or deputies even went so far as to knock on the Desrochers' relatives doors on Christmas Day, a day when the Desrochers might be expected to be in town, but this too proved fruitless. From that point on the efforts of the local police diminished and may have just ceased.

In 1986 the Tucson police and Pima County Sheriff's Office formed a "Custodial Interference Unit" in conjunction with Pima County Attorney's Office. Kate Dawes, Deputy County Attorney, serves on this Unit. The Unit was basically established to combat "parental kidnapping" problems. Neither Hegyi nor the Altahas were aware of the formation of this Unit until just recently. If they had been they would have sought assistance.

In late 1987 Hegyi began calling the Desrocher's relatives stating he wanted to take their depositions. At this point, in late 1987, Mr. Desrochers called Hugh Hegyi from an unknown location to discuss possible settlement of the case. The proposal the Desrochers offered was unacceptable. He proposed that Thurza Altaha would drop her civil action against the Desrochers; that she would not press any charges for violation of the orders of the Arizona state courts; she would drop any claim to custody of Lalita; and in exchange, she or she and her husband would be allowed brief visits with Lalita under the supervision of the Desrochers. They would not agree to come out of hiding unless they could be guaranteed custody of Lalita. The Altahas and Hegyi rejected these offers. Mr. Desrochers called Hegyi on three or four occasions to discuss this "offer". (NOTE: From Mr. Skaggs statement and a later deposition of the Desrochers, we now know the Desrochers were living in Durango, Colorado -- not far from the Navajo reservation. We also know that Goodfield had already gotten involved with the Desrochers.)

It was about this time that Hegyi discovered the existence of the Custodial Interference Unit in Tucson. Kate Dawes of the County Attorney's Office, and Sgt. Czech apparently headed up the Unit. By this time the Desrochers had retained Alex Gaynes to represent them in any criminal proceeding. In January of 1988 the Desrochers turned themselves in to the Tucson authorities and surrendered Lalita.

Summer of 1988 - First contact with Goodfield:

In the summer of 1988 Hugh Hegyi began receiving telephone calls from Dr. Goodfield. Goodfield was calling from San

Francisco and was holding himself out as a representative of the Civil Rights Commission. He wanted to set up an interview with Thurza Altaha and Lalita. He indicated that if they would not agree to such an interview, then they would be subpoenaed to an interview. Hegyi had never heard of Goodfield before, or at least was unsure of his involvement with the Civil Rights Commission. He asked Goodfield to provide him with a letter from the Civil Rights Commission verifying his status and confirming his request. Hegyi never got such a letter. He talked to Goodfield by telephone on several occasions that summer.

On November 18, 1988, a deposition was set in the Altaha v. Desrochers case to depose the Altahas -- presumably Thurza, Lowell and Lalita -- in Gallup. That day an extremely heavy snow fell. The Altahas drove from Whiteriver and got as far as Ganado, within a few miles of Gallup, but could not make it in. They had to turn around and return home. (NOTE: A deposition of the Desrochers was taken around this time. See following notes.)

Hugh advises that despite the fact Gallup was almost closed down, Barry Goodfield turned up with a film crew with him. Hugh had not been advised that Goodfield would be there and was totally surprised, not only by his presence but by the presence of the film crew. I believe there had been some prior discussion between Hegyi and Goodfield about Goodfield having a "discussion" or "interview" and Hugh had told Goodfield he did not want any such discussion. He and Goodfield got into a shouting match--then calmed down and the two of them began talking.

At that point Goodfield advised Hugh that he was working for the Desrochers -- he had been retained as an expert witness. (NOTE: At this point his status as a consultant to the Civil Rights Commission was in some doubt. I don't know if this placed him in a conflict of interest situation, but it certainly put him in a position where his objectivity as a consultant to the Commission could be questioned). It turned out that he had essentially volunteered his services, charging (according to Goodfield) only one dollar for his time. Goodfield expressed a strong desire to talk with the Altahas, stating that his only interest was in serving the best interests of Lalita. He told Hugh that he had been retained as an expert witness, but if Hugh could set up a meeting where he could talk to the Altahas and serve as an intermediary, he would agree to no longer serve as an expert witness for the Desrochers. Hugh felt that no harm could come from simply allowing Goodfield to talk to the Altahas and they could gain by having Goodfield eliminated as an expert witness. He agreed to contact the Altahas.

Hugh got hold of the Altahas at home and they agreed to meet with Hugh and Goodfield at Snow Flake the next day. However, they would not bring Lalita to the meeting. The meeting at Snow Flake did take place on November 19th, the day after the day

previously set for the deposition. Hugh and Goodfield drove down to Snow Flake together -- a distance of some hours -- and had an opportunity to talk to each other at some length.

Goodfield told Hugh that he is the owner and operator of the Goodfield Institute in San Francisco, some sort of counseling institute. He claims to have a PhD in psychology from some college or university in New Jersey. He stated that he only spends about half his time in San Francisco; the other half he spends in Amsterdam, Holland, teaching European psychologists American counseling systems. He claimed to have been associated with the Nixon White House as some sort of "special assistant", holding a GS 16 or 17 grade level; and that on more than one occasion he had been called upon to conduct special courses at the Pentagon. He also stated that he had been involved with Professor Hayakawa when Hayakawa made a name for himself in connection with the student riots at San Francisco State University, claiming he is the one that gave Hayakawa the famous "tam o'shanter" in which Hayakawa was photographed. In the course of the trip, Hugh and Goodfield got on reasonably friendly terms.

When they met with the Altahas at Snow Flake, Goodfield's whole pitch was to get the Altahas to allow Lalita to return to the Desrochers to live, and in exchange they would be given some limited right to visit. Goodfield was willing to talk about the opposite arrangement, but he did not really have any interest in the idea. The Altahas made no commitments but said they would go home and think about it.

There was some subsequent communication from Goodfield through Hugh in an attempt to arrange a further meeting. The Altahas apparently had to break one of the agreed dates, and scheduling difficulties of Hugh, Goodfield or the Altahas prevented a new date for a follow-up meeting. At some point Goodfield expressed frustration to Hugh and said there was no point in attempting to arrange further meetings and the only solution was to continue to trial.

At no time did Goodfield ever advise Hugh of his intentions to go to Whiteriver to interview either the Altahas or Lalita. Hugh heard of the incident the following day, February 8th, when he got phone calls from Whiteriver -- Claudeen Arthur and probably the Altahas. He phoned Goodfield in San Francisco to express his anger at what had occurred.

Hugh apparently asked Goodfield how the U. S. Marshals got involved in this. Goodfield advised Hugh that he and his party had just stumbled onto them out at the reservation. Goodfield's party had gotten lost out there and so also had the Marshals. They decided to help each other find their way around.

National Broadcasting Company -- NBC

I asked Hugh if he had any idea how NBC got involved in this. It turned out that Goodfield had been in contact with NBC for some time. His principal contact is Mr. Martin Phillips of Great Neck, New York, one of the NBC camera crew that got arrested at Globe. Phillips also had been in touch with Hugh Hegyi as early as September, 1988, apparently trying to set up some kind of story on the Altaha case. Apparently Hugh and Phillips have talked on several occasions.

An interesting and humorous side light to this is that when Phillips and his crew were placed under arrest in Globe, Phillips called Hugh from custody apparently trying to get Hugh's help to get out.

The February 11, 1989 NBC interview:

Again, much to my surprise, as we discussed the NBC connection, Hugh told me that the Altahas had had a two hour interview with NBC (presumably Phillips) up at Window Rock on February 11th -- less than a week after the incident at Whiteriver. The whole thing was filmed, presumably for future use in a piece on the Indian Child Welfare Act. Apparently the Altahas were up at Window Rock for a basketball game and agreed to the interview.

Proceedings in the White Mountain Apache Tribal Court:

Almost as a side note to the above, it should be noted that the Desrochers at one point brought an action in the White Mountain Apache Tribal Juvenile Court in an attempt to get custody of Lalita. In May of 1988, the Desrochers, through their attorney, Alex Gaynes, filed a pleading in the court entitled "Petition Alleging Dependency" (In the matter of the Custody of Lalita Johanna Johnson, aka, Lalita (Desrochers) Altaha, No. JP 81-9, filed May 9, 1989) alleging parental neglect and abuse and "death threats". The Petition is signed by Nadine Desrochers.

Hegyi moved to dismiss the Petition on, among other grounds, provisions in the Arizona Uniform Child Custody Jurisdiction Act that deny standing to a person who has himself acted inequitably in connection with the custody of a child. (When the tribe has not itself adopted an ordinance or law on a subject, the laws of the State of Arizona apply in the tribal court).

The court, apparently of its own motion, did order a home study. The results of that study are set forth above under the interviews on Monday. The study found a satisfactory home situation.

Gaynes failed to file an Answer to Hegyi's Motion to

Dismiss. Hegyi brought this to Gaynes attention, but Gaynes still did not act. On September 1, 1988, the court entered an order of dismissal. By that time Gaynes had apparently attempted to file a pleading of some sort, but Hegyi had not yet received it and it is doubtful if it arrived at the court either.

Deposition of the Desrochers:

In November of 1988 Hugh Hegyi took the deposition of the Norman and Nadine Desrochers in connection with the damage action in Altaha v. Desrochers. This deposition revealed that immediately following the departure of the Desrochers in 1982 when the Arizona court vacated the adoption decree of the Texas courts, the Desrochers did in fact move about frequently. They kept on the move for about a year and a half, but then settled in Durango, Colorado, where they have been living ever since.

Aside from the short time in Tucson when Lalita was about seven years old, they have never enrolled Lalita in any school. The Desrochers have been attempting to educate her at home. The Desrochers are well spoken persons and make a good appearance.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

05 MAY 1989

Honorable Daniel K. Inouye
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your letter, dated April 17, 1989, regarding the Committee's scheduled hearing on May 19, 1989.

The statement of John J. Twomey, Deputy Director of the United States Marshals Service, as you requested, is enclosed. We must respectfully decline the request to authorize appearances by the Deputy U.S. Marshals who served as security escorts to the Chairman of the Civil Rights Commission on the occasion of the event under review by the Committee. As you may know, the Deputies have been interviewed by Committee staff regarding the matter. Their appearances at a hearing to discuss activities surrounding the security detail would be contrary to Department and U.S. Marshals Service policy.

Please feel free to contact me if you have further questions. We look forward to cooperating with the Committee on this important matter.

Sincerely,

Carol T. Crawford

Carol T. Crawford
Acting Assistant Attorney General

Enclosure

U.S. Department of Justice

United States Marshals Service

600 Army Navy Drive
Arlington, VA 22202-4210

STATEMENT BY JOHN J. TWOMEY

DEPUTY DIRECTOR, U.S. MARSHALS SERVICE

SUBMITTED TO

THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

On January 24, 1989, I received a telephone call from a Stella Duran, who identified herself as Executive Assistant to William Allen, Chairman of the U.S. Commission on Civil Rights. Ms. Duran advised me that Chairman Allen was scheduling a trip to Arizona for the purpose of "taking a deposition on the White Mountain Apache Indian Reservation." Ms. Duran stated that she was seeking authorization for Deputy U.S. Marshals (DUSM) from the District of Arizona to accompany Chairman Allen to the reservation because there were concerns for his safety. She further requested that DUSM's J.R. Skaggs and Robert L. Morris, District of Arizona, be assigned to this detail, if possible, because they had accompanied the Chairman on a previous trip to the reservation.

Later, on the same date, I telephonically contacted Supervisor Tom Morrisey, District of Arizona, and advised him of Ms. Duran's request. He stated that DUSM's Skaggs and Morrisey were available and could be assigned to the security detail for Chairman Allen. Supervisor Morrisey confirmed that these two DUSM's had provided security for the Chairman during a trip to the reservation several months previous. This earlier security detail, according to Morrisey, had been approved by the U.S. Marshals Service Headquarter's Enforcement Division. The Enforcement Division, at that time, had the authority to approve this assignment; however, for the record, I had no personal knowledge of this event.

Upon being advised by Supervisor Morrisey that the District could perform the assignment, I asked Morrisey to contact Ms. Duran directly for the purpose of scheduling the assignment.

Thereafter, and continuing to this date, I have had no further contact with Ms. Duran, nor have I had contact at any time with Chairman Allen or other members or employees of the Commission.

For the record, I would note that Ms. Duran did not inform me of the nature or circumstances of the case with which Chairman Allen was involved. Also, no mention was made to me of Dr. Barry Goodfield, his status or his role. Further, I was not advised that a television news crew would be present and involved in this exercise.

John J. Twomey
May 1, 1989

PREPARED STATEMENT OF COMMISSIONER ROBERT A. DESTRO
UNITED STATES COMMISSION ON CIVIL RIGHTS

Before the SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

FRIDAY, MAY 19, 1989

Mr. Chairman and Members of the Committee. I thank you for the opportunity to appear before you this morning, and look forward to a full and open discussion of the events surrounding the unfortunate incident at the White Mountain Apache Nation which is the subject of this hearing. As you well know, the Commission has disavowed both prior knowledge of, or agreement with, the purpose behind Chairman Allen's trip to White Mountain. The Commissioners have unanimously expressed their profound regrets to the Altaha family, and there is little need at this point for me to comment further on our collective opinion that apologies were clearly warranted.

My reason for appearing before you today is fairly simple. I am the other member of the Commission's subcommittee which has been investigating tribal court enforcement of the Indian Civil Rights Act [ICRA] since early 1986. Alone of the Commissioners (including the Chairman), I have attended every hearing and meeting, reviewed many of the relevant documents, spoken extensively with noted scholars in the field of Indian law, and consulted extensively with interested parties. I appear before you today concerned and profoundly disappointed that the integrity of several years' hard work has been jeopardized by a

thoughtless intrusion by a federal official into the life of a family and community.

In my view, the issue before this Committee today is neither tribal sovereignty, nor the Indian Civil Rights Act. The issue, Mr. Chairman, is breach of trust. During the course of the past three years, I have spent a good deal of time and effort seeking to educate myself and others on the practical and legal problems which face the diverse and far-flung communities collectively known as "Indian Country." It has been a daunting task, even for a professor who teaches constitutional law and conflict of laws. Nevertheless, the experience has been an immensely rewarding one, not only because of the wonderful people who have taken time and travelled great distances to share their views with the ICRA subcommittee and Commission staff, but also because it has so clearly illustrated for me the apprehension with which tribal governments view federal investigations into the affairs of their respective communities. The theme has been consistent: our governmental systems are young, underfunded and in many instances inexperienced; we need help and understanding, not unjustifiable interference.

Thus, when Chairman Allen took it upon himself to intrude on what is essentially a private, family matter, it was neither an overriding concern for tribal sovereignty nor civil rights that prompted my own immediate reaction. Rather, it was dumbfounded amazement and outrage that the Chairman of the Civil Rights Commission would breach the trust, not only of his office and his colleagues, but of the federal government which he represents, by

allowing himself to participate in what appeared to be, at least at the outset, every parent's worst nightmare.

And it is in the context of a trusteeship that I would respectfully urge the Committee to view the Commission's ICRA project. The issues of sovereignty and civil rights which make the ICRA project so complex are, at bottom, a reflection of the far more fundamental fact that *all* governmental officials -- federal, tribal, state and local -- are trustees of the public interest. The legitimate concerns for tribal sovereignty (including the integrity of Indian Child Welfare Act decrees) on the part of this Committee and the witnesses who will appear today illustrate the personal and institutional damage that can be done by breach of trust at the federal level. The Commission's ICRA project explores issues of breach of trust with respect to civil rights at the federal, tribal and state levels. The complaints about ICRA enforcement and problems catalogued in the Commission's record are real and must not be ignored. The BIA's performance under the ICRA, for example, has been abysmal and everyone knows it. The real fear of the ICRA project and report has been that it will become a device either to restructure tribal government, or subject tribal affairs to plenary federal review. In my view, neither approach is warranted by the facts.

Although my own review of the record and consultations with tribal judges and other authorities is ongoing, I have reached the firm conclusion that once the Committee's investigation of this unfortunate incident is complete, we should turn our

attention to the task of strengthening self-government given the diversity of existing tribal structures and the broad outlines of the ICRA. The collective task of those who profess a commitment to self-determination and civil rights in Indian country is to cooperate in a thorough discussion of the need for institution building and development at the local level. This too is a matter of public trust, and those who are charged with its protection must be willing to demonstrate by their actions that they are willing -- across the board -- to do what is right.

Tribal sovereignty is the law. So is the ICRA. The sole task of the Commission is to investigate the facts, and to suggest practical ways in which both can be preserved and strengthened. Effective and fair disposition of legal controversies, whether through the formal mechanism of courts or through alternative or traditional dispute resolution, is essential for community stability and development. So if the Commission is to take its own trusteeship responsibilities seriously, its first step must be to accept for Indian country what we accept as a given in this country: the right of the people to a representative self-government at the local level which respects their civil rights.

Beyond that, all the Commission can do is suggest options for discussion based on the factual record we have gathered. Since discussion of possible options is not complete, and this hearing is not the place to discuss or speculate about what they might be, I will urge the members of the Committee, their staff, or any of the witnesses concerned about the ICRA project to discuss

their concerns with the subcommittee and the staff of the Commission should they be inclined to do so. I will be happy to make myself available at any mutually convenient time.

Thank you for your attention.

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

TESTIMONY OF

HONORABLE WILLIAM B. ALLEN
Chairman, U. S. Commission on Civil Rights

before the Select Committee on Indian Affairs
United States Senate

concerning

Incident at Whiteriver, Arizona 7 February 1989

held at Washington, D. C.

19 May 1989

MR. CHAIRMAN and Committee Members: I am pleased to be afforded the opportunity to present before you a statement of the principles and purposes which account for my presence at the White Mountain Apache Indian Reservation on the date indicated. As you know, that visit has occasioned considerable controversy. Perhaps nowhere have the multifold misunderstandings and resentments been expressed so cogently as in a letter I received nearly one month ago from an individual from the State of Wisconsin. With your permission, I will present a typed copy of that letter, along with my response to it, as the substance of my testimony before you.*

Before I undertake that, however, I wish to respond to the most frequently asked question I have heard, and which is not represented in that letter. That question is, in brief, why are you so concerned about civil rights on Indian reservations when Indian spokesmen seem so universally satisfied. In response I need do no more than to borrow the apothegm of Abraham Lincoln, regarding a similar challenge about the justice and commodiousness of slavery:

> ...we will suppose the Rev. Dr. Ross has a slave and the question is, "Is it the Will of God that Sam shall remain a slave, or be set free?" The Almighty gives no audible answer to the question, and his revelation -- the Bible -- gives none -- or, at most, none but such as admits of a squabble, as to its meaning. <u>No one thinks of asking Sam's opinion on it.</u> So, at last, it

> comes to this, that Dr. Ross is to decide the question. And while he considers it, he sits in the shade, with gloves on his hands, and subsists on the bread that Sam is earning in the burning sun. If he decides that God wills Sam to continue a slave, he thereby retains his own comfortable position; but if he decides that God wills Sam to be free, he thereby has to walk out of the shade, throw off his gloves, and delve for his own bread. Will Dr. Ross be actuated by that perfect impartiality, which has ever been considered most favorable to correct decisions? [Abraham Lincoln, Collected Works, Basler edition, volume III, pp. 337-338.]

Now, read the arraignment from Yamel in Milwaukee, Wisconsin:

"April 18, 1989

Dear Commissioner Allen:

I recently read an article in News From Indian Country about your intervention in a child custody case. On Feb. 7, 1989 you attempted to abduct a 14-year-old White Mountain Apache girl. The story of this aborted kidnapping was aired on "NBC Nightly News with Tom Browkaw (sic)".

The facts seem clear and straightforward. Tribal officials stopped you before you were able to remove Lalita Altaha from the reservation. She had been living with her mother since last fall after more than 12 years of illegal custody with non-Indian parents.

You entered the reservation with US Marshals, a psychologist and an NBC News team without notifying tribal officials or Alatha's (sic) mother of the purpose of your visit. You followed the girl home and tried to kidnap her but were thwarted in your effort.

Your actions alone were shocking and illegal but equally offensive was your explanation at a luncheon March 2 at the fifth annual conference of the Native American Press association (sic). You told the gathering that you "put aside government to government relations" and "took off the robes of the law" when you went on the reservation. Despite your disregard for federal and tribal law on this issue, you claim to respect Indian culture, tribal sovereignity (sic) and tribal law.

Nothing could be further from the truth. No one, especially a federal official paid by my tax dollars, has the right to enter a foreign country and kidnap one of its citizens. It is particularly shocking that a descendant of slaves (of which I am also one) should be violating Indian sovereignity (sic). If your

deeds go unpunished there would be nothing to prevent federal officials from deciding which laws should be upheld and which to ignore. And further, the door could be left open to more kidnappings of Native American children.

Since the Desrochers were prosecuted on felony charges and placed on probation for maintaining illegal custody, I feel you should receive a similar punishment. Having violated your oath to uphold the law, you should resign or be fired. And then the tribe should prosecute you. This is a sad day for the former US Civil Rights Commission.

Eyes on the prize,

Yamel."

* * *

The following is a true copy of my response to Yamel:

15 May 1989

Yamel
3104 W. Wells, Apt. 210
Milwaukee, Wisconsin 53208

Dear Yamel:

I have received your letter of 18 April, in which you express sincere and deep misgivings concerning my journey to Whiteriver, Arizona last February 7th. I wish to respond to you in detail, but more importantly with an offer of friendship.

Your letter proves you a defender of law and justice. Moved by "facts" you regard as "clear and straight-forward," you have arrived at a judgment which I regard as consistent with respect for the rule of law. It will be no less consistent with your respect for the rule of law for you to revise your estimate of my conduct and motivations, once you have learned that what you took to be facts are in reality anti-facts -- untruths, half-truths, and sometimes even direct disinformation.

In what follows I will tell you the truth and even attach documents to illustrate it. What will I request from you in return? Simply this, namely, that you will exert yourself no less vigorously to defend, than heretofore you have attacked, my honor and reputation. And even that I ask not on my behalf. It

concerns me more that we join in a coherent and unified defense of Indians as enjoying fully the rights of American citizenship -- always keeping, as you sign yourself, our "eyes on the prize."

THE "KIDNAP"

The first fact which you took to be clearly and straightforwardly established was that I attempted "to kidnap Lalita Altaha." This claim is altogether and absolutely false -- so much so that not only would I never have threatened Lalita, neither would I have allowed anyone to do so in my presence. I am most grateful, furthermore, that Chairman Johnson of the White Mountain Apaches seems at length to have recognized the propriety of my conduct in this particular (See his letter of 21 March, enclosed). His willingness to say so has meant much to me, and means further that we might yet agree on substantive matters where any subsisting differences can have great consequences. I will discuss some of these areas after I have reviewed all of your claimed facts and judgments. Absolve me, then, of this false charge (and its later repetitions in your letter), so that we can move on.

Next, you report that tribal officials stopped me in the act. As there was no kidnapping, I could not have been "stopped in the act," which might suffice to dismiss this fact. But I will go further: at no time whatever on 7 February 1989 was I detained, questioned, or otherwise directly communicated with by any representative of the tribal government or police or of the Bureau of Indian Affairs, until departing late that evening from the Gila County Sheriff's Office, my path crossed with that of officials from the tribe, to whom I extended the hand of fellowship, regretted the misunderstandings, and said good-night, all which required not more than thirty seconds. Nor have I since had any direct contact apart from correspondence with the tribe, the BIA, the Senate Select Committee staff, or anyone else, though I made myself available for such purposes. In short, whoever reports direct contact with me by the tribe reports what never happened and for reasons for which they rather than I must account. Again, absolve me of any implications stemming from your having incautiously accepted a false account, and I will proceed to the next claim.

WHO FAILED LALITA: CONGRESS

In third position is your representation of Lalita's time away from the reservation as "twelve years of illegal custody." That claim does not affect me, and you might expect me to slide

past it. It does carry an important misconception within its terms, however, and one which goes to the heart of my concern with this case. I believe that no civilization can succeed when it fails its young. Lalita's plight demonstrates how massively we fail the young when we substitute for active parental regard the pseudo-science of political ideologues and make our children the objects of our theories rather than flesh of our flesh.

By referring to Lalita's twelve years with the Desrochers as illegal, you can only be referring to the fact that the Desrochers are "white persons," while Lalita is an Indian. You therefore read the Indian Child Welfare Act as making it illegal for an Indian child to live in a non-Indian family, even when the natural mother herself is responsible for the placement. And you depreciate, if not dehumanize, the love that can characterize such families and obviously did characterize the Desrochers' home.

I understand your interpretation of the ICWA, although I do not think its terms literally lead to such a result. Further, although the ICWA does foster such interpretations as your own, I must remind you that the Act was passed in 1978 -- some three years after Thurza Johnson twice voluntarily placed Lalita with the Desrochers (the first time through the House of Samuel). By every fair construction Lalita came to be held illegally by the Desrochers only at the end of 1976, when they evaded an apparent tribal court order (in which the mother could not have participated) and sought to consummate a formal adoption outside of the jurisdiction of domicile for all parties (but again, note, two years prior to passage of the ICWA).

The adoption was consummated in March, 1977 (one year before ICWA) but then set aside five years later, in a court order of January, 1982, resulting from a petition filed in 1979 (one year after ICWA). On a generous interpretation (and one might think such love as theirs deserves generosity) one could say the illegal custody began only when the Desrochers ran away to evade the 1982 court order -- that would make a period of six years illegal custody, beginning when Lalita was seven years of age (nearly all of which had been lived with the Desrochers!) and ending at age 13.

These "facts" are the official findings of fact of the court. They announce that your version of the facts is in error. They also help to explain how this tragedy was created in the first place. I direct your attention to the Court's relation of how the Desrochers received notice of the 1976 tribal court order:

> 15. On December 10, 1976 Donie Green telephoned Respondents and informed them that Judge Anna Lee Early of the White Mountain Apache Tribal Court was in Tucson

to pick up the child, Lalita.

16. Donie Green also told Respondents that Judge Early had a tribal court order dealing with the custody of the child.

Now compare the Court's version with that contained in the Desrochers's statement, and notice that the essentials are not in dispute:

...officials from the White Mountain Tribe were at the House of Samuel demanding Lita's return. We were confused... (I append their statement)

The Desrochers's statement agrees with the Court's finding of fact, and here is where the tragedy began. Consider: Where was the fair notice? Where was the hearing? Where was that rule of law that persuades Americans to rest easily in their own beds at night? It did not exist, and because it did not exist then, we continue now the struggle to find out how to restore it. To our great disappointment we must observe that the Indian Child Welfare Act of 1978 did not do so.

Central to these accounts is the extraordinary action to alter the care arrangement of an eighteen month old child in 1976, with virtually no notice and certainly no explanation to the established guardian! In effect, nothing more than a call in the night was to separate forever loving foster parents and the child, with barely 18 hours to anticipate and prepare. How could an order have issued in any court so to dispose of a child, without at least an interview with the guardians to inform the court of the child's circumstances? That the Desrochers sought out the natural mother in Texas (where they knew her to be) under such circumstances, and tried to make their relationship to Lalita permanent within the law as they understood it, is rather evidence of their determination to be responsible guardians.

Would you surrender an innocent babe who had bonded to you (and to whom you had no less bonded!) to a cold, inflexible law that would not even provide you or the child a hearing in the process? Fair notice is the most fundamental of the fundamental rules of due process under our Constitution. The violation of that principle is what set in motion the events that have so powerfully shaped Lalita's life. The tribal court did that in advance of the ICWA, and therefore without implicating Congress. The subsequent passage of the ICWA, however, shaped the eventual judgment in the case and carried Congress's retrospective approval to this defective mode of proceeding. Failing to build into the ICWA adequate due process requirements for all parties concerned, Congress failed Lalita.

The Desrochers are not exonerated because we here take note of defects which, like a catch-22, operate to rationalize if not to justify their conduct. But it is perhaps still more important to observe that Congress and the tribe are not exonerated merely because the Desrochers have been found guilty! When we review your third claim, we find there is much blame to spread around -- which ought to be sufficient to counsel us to stop blaming and start healing. Let's move on.

MY EXPLANATION

You were apparently in the audience (or read a report of my remarks) in Tulsa on March 2, where you heard me to say that I "took off the robes of law." You seem, though, to have mistaken my use of the figure, for I referred only to the coercive apparatus of the state. I assure you that I have never affected judicial robes. The figure of speech I employed meant no more than that I went about my business informally, designing thereby to avoid giving offense.

Chairman Johnson has assured me that my fears in this regard were groundless. I accept his statement at face value. That cannot change the past twelve-month, but it may decisively affect the coming twelve-month, in which I have asked him to serve as a confidential reviewer of the Commission's report before it is finalized. As to his reading of the posture of the tribe's legal counsel's actions at the Commission's July, 1988 hearing, and its marked contrariety with my own reading and recollection, I think it sufficient to note that we have a difference of opinion on that subject. We could strive to reconcile our interpretations of that event, but I know not to what avail. I accept his interpretation as of now, and look forward to the fruit that spirit of cooperation will bear henceforward.

My Tulsa statement, however, addressed far more than the sensitivity I have to claims of tribal sovereignty. It reflected as well my view of the importance of the particular mission I had undertaken and also my view of the overall jurisdiction of the Commission in such matters. I will address these matters briefly here and attach our General Counsel's elaboration of the significance of the Commission's jurisdiction.

I have already noted how tragically we failed Lalita by not guaranteeing due process of law in her case. That was at the start. My awareness of this flaw rankled -- partly because it seemed to recur in other ICWA cases. I wondered whether, at least, at the end the process had been somewhat more regularized. The touchstone of that consideration for older children is to know whether courts consult the "best interests" of the children. The mere consideration of a child's best interest does not ordain

one remedy or another in a custody case. It does, however, disclose dispositions and practices of child welfare agencies that are fundamental to assess whether they operate fairly. In Lalita's case, above all, I would have been reassured to know that the tribe had gone through that formality. I believed, and still believe, that she is the best party to convey that information (although I would never subject her to doing so in a formal, public hearing!).

Remember, though, that Lalita's is one case. I seek far more than that. Therefore her case, while poignant, is only illustrative. A major study by the Department of Health and Human Services only last year (having a different focus than on the question of fairness and civil rights) enables us to put this illustrative case in context.** Among the elaborate post-ICWA findings in that work, the following detained my attention longest:

1. There has been no reduction of the flow of Indian children into substitute care, at the same time as there is a dramatic shortage of Indian foster homes.

2. There has been a declining comparative rate of adoption for Indian children and correlatively an increasing reluctance to terminate parental rights.

3. The ICWA may have been "undermined" by concerns about tribal accountability.

4. To some degree an absence of tribal courts continues to affect prospects for orderly procedures and satisfactory implementaton of the law.

5. There have been limited [if any] federal efforts to communicate performance standards and to monitor or enforce compliance.

These are grave concerns which go far to explain my concern with ICWA. These difficulties do not merely raise questions about the implementation of a law. They raise questions about the human costs of the legislation. The over-all "Report" served to underscore this angle of view.

The report recorded complaints from states' public programs that are saddled with "responsibility without jurisdiction . . . impeding . . . delivery of effective child welfare services." This is a case in which the guarantee of "due process" amounts to a guarantee of substantive benefits. We find evidence of "automatic" transfers by states to tribal systems, ducking the murky problems and also "to escape financial responsibility." I believe that at least the first of these inclinations lay behind a California court's decision last year in the Pitts-Keetso case,

a decision that created needless turmoil for all involved and severely truncated the rights of the natural mother.

But when state and tribal systems do not err on one side, they may err no less surely on the other. Thus, public agencies sometimes do not make the transference to a tribe, pleading the "absence of a tribal court" and no one as yet having thought integrated agencies a "natural" idea. Tribes are not consistently accorded "full faith and credit" for their decisions or actions, while innocent parents and children are suspended in the ambiguous middle between these conflicting pressures. Some tribal courts simply close down business, due to a shortage of funds, even as some state courts automatically apply the ICWA to all who "appear to be Indian." Thus, people may find the state courts closed to them by law and the tribal courts closed by bankruptcy!

What are the implications for an Indian child's rights, of that statement from a judge, that "we don't make adjudications of Indian children. We transfer jurisidction in all cases"? A rigid racial rule, is it not also racist? It has long been said that "general rules bear hard on particular cases." But that aphorism was meant to suggest the difficulty of writing particular exceptions into the laws, and hence a justification for equity. It never was intended to convey an iron will to shape the individual to the general rule!

Look at the facts: in one case involving two children a tribe at first declined jurisdiction, throwing the kids arguendo on the mercy of the state. Next, though, the tribe changed its mind and requested jurisdiction, but only for one of the kids! Can Congress really have meant that the laws and Constitution of the United States would afford no protection to its most vulnerable citziens -- its youths -- in such cases? In another case still, a tribe notified of impending action in a case ignored the case for two years (that is, while a young child continued to be shaped and taught for a large part of its life). When the state finally began termination of parental rights, the tribe requested jurisdiction. "The child's attorney did not want the case transferred to the tribe. The ICWA does not allow the child's opinion to be considered [in matters of transfer], and the state court judge felt this deprived the child of a right to choice that state law grants." The tribal lawyer in this case finally yielded.

These cases are different from Lalita's, yet the same. The last case could well have been her own, had the people deciding her fate consistently consulted her best interests. True, the ICWA does not establish a privilege for the child's opinion in transfer cases. That does not prevent tribes from doing so, however. This is the very reason I sought out Lalita. Despairing that Congress might not protect her best interest, I

prayed that at least the tribe might do so unbidden. My hopeful prayer was wrong. Lalita like all to many others has rather been a toy of sovereignty games than an American child with a future. And the United States Government is the head gamesman. As I said before, no civilization can succeed when it fails its young.

TRIBE AND GOVERNMENT

Next, Yamel, you inquire how "a federal official paid by your tax dollars" can enter a "foreign country" and "kidnap one of its citizens." Since there was no kidnapping, you must be relieved that your tax dollars were not wasted. But at the heart of this query is the implicit assertion that the government of the United States lacks jurisdiction on reservations -- whether or not Indians pay our taxes, vote in our elections, and defend our liberties in our country's wars. I refer you again to our General Counsel's jurisdiction memorandum. Now, though, permit me to go further and to address you in my own name.

I invite you to re-read the opening of the ICWA, where the Congress declares its "finding" that "Congress has plenary power over Indian affairs." This, it seems to me, is the source of your concern -- this purported plenary power which has been manufactured from whole cloth and can be justified neither by the organic laws of this Republic nor by any canons of the natural law. Even on the foundation of conquest it is not possible to establish plenary power! For the moment the threat to a conqueror's person subsides, conqueror and conquered return to that natural state in which neither is the ruler of the other without consent. On that basis, Congress's asserted jurisdiction over "the" Indian [and I submit that there is no universal Indian!] is entirely unjustified. Nor can plenary power be bootstrapped on the back of the American people's obligations [and they are our obligations, not Congress's] to the Indians. For the obligations persist on the strength of specific commitments and moral responsibility, not merely on strength.

Do not think me unfair to Congress or suspiciously solicitous to Indians. I am neither. My concerns derive from the fact that Congress's asserted plenary power over the Indians amounts to an attack on the rights of all Americans. Congress has carved out an unacceptable exception to the limitations on its powers inscribed in our organic laws and which can only operate eventually to overturn the very foundations of this Republic. This is true whether Indian communities are regarded as foreign nations (as some claim) or as self-defining commmunities of American citizens (as we otherwise have reason to believe). I attach a confidential working memorandum from the Commission's ICRA study, which is no longer germane to that study but indicates fairly what I believe in this regard.

Far from regarding Indians as foreign -- whatever the status of their communities -- I conceive them at this moment those Americans whose civil rights are most endangered and perhaps more by Congress than by local governments. When I joined the Commission just two years ago, debate had raged over the question, whether civil rights protections were only for American blacks, or perhaps other minorities, or for all Americans. I stand on the side of all Americans, and I believe this issue of Indian civil rights demonstrates conclusively the necessity of such a stance.

The Indians' day -- not the Indians' masters' day but the Indians' day -- has come. Congress has the power to protect the civil rights of Indians, and not one bit more power than that. All else is usurpation. Just as is the case for the rest of us, Congress's power ends where the protection of our rights ends.

FOUR BRIEF CHARGES

You object, Yamel, that a descendant of slaves should violate "Indian sovereignty." Let's avoid the pun, would you rather see a freeman's son do so, and go to the heart of the matter: whatever sovereignty one concedes to any government under heaven, it will remain true that that sovereignty cannot repeal the laws of nature, by whose writ individuals are at liberty to speak to whom they will, circumstances permitting. I can never accept that any American citizen is bound to obtain the leave of any government whatever before speaking with another citizen otherwise at liberty.

You next observe that my "deeds" deserve punishment as an admonition to government officials that this is a nation ruled by laws and not men. The rule of law, I concur, is the object of our continued longings -- and a color-blind law at that! I profess ignorance, however, as to how the rule of law may be advanced by punishing innocence.

In almost the same breath you arraign me for violating my oath of office, to "defend the Constitution of the United States against all enemies, foreign and domestic." I suspect that you did not recall that that oath recognizes the potential of domestic enemies to constitutional liberties. At all events, I have pursued my oath with a zeal tempered by responsibility.

Nevertheless, your wish that I "resign or be fired" may be approriate for such conduct. For if my government cannot see clearly, as I do, the need to guarantee full citizenship for Indians, I am working at cross purposes with it and perhaps would work better out of it. If Congress can not see, as I do, that it

has established a racist scaffolding within which it imprisons Indians, then I am an obstacle to Congress's career of disregard for the precious rights of humanity which ought alone to inform our policies. If the Administration fails to address itself to these glaring defects in our nation's commitment to the equal rights of citizenship, and if the President takes pride in our treatment of Indians, as I do not, then we love different Americas, and I can not be expected to admire his.

In all these cases, where to hear the truth makes the powerful uneasy, then either I had better be fired or the powerful must resolve to live without ease. Or, perhaps, I should be asked to resign. For it is only too clear that, asked by the right persons for the right reasons, I might be only to eager to comply, preferring to share my disappointments with honest citizens. I say, then, Yamel, be cautious what you ask for in this regard, for you may get what you deserve.

Finally, you say the tribe should prosecute me, in which I presume you intend what you imply, namely to extend to me the fundamental American assumption of innocence. I am happy to accept it.

* * *

I have answered your questions, and you will perhaps permit me a concluding general observation. In the 18th century Europe romanticized the universal Indian of North America as a "noble savage." That romanticism lingered on in Jefferson's Notes on the State of Virginia in 1783. One consequence of the romanticized view was an unnatural delay in seeing the Indians as fellow human beings, who were neither more nor less naturally noble than others and who were included in the earth-shaking affirmation that "all men are capable of self-government" (as George Washington urged).

The moral vacuum created by this unnatural delay not only facilitated the development of the paternalistic, "great white father," regime in the 19th century, but it opened the door to that century's brutalization of Indians. It was no surprise that immodest injuries to humanity went hand-in-hand with immodest pretenses to govern and civilize Indians. Thus, when Tocqueville visited America in the 1830s and observed, concerning the fate of the Indians, "never has a people been destroyed with so much respect for humanity," the studied ambiguity of his remark captured the tension between American principles and practices concerning Indians.

In the 20th century we have inherited the obligation to resolve those tensions to the general benefit of our Republic and the particular benefit of long-suffering Indians. Our century is already old and our progress is tardy. Part of our difficulty

has stemmed from a failure to recognize the role we are to play. America is no ancient Egypt. She cannot pursue these captives to the ocean, daring heaven to provide a miracle. Instead, Indians must be accorded free run of this land -- neither locked up on reservations and subjected to the arbitrary sway of overseers under the guise of sovereignty, nor wrenched from the comfortable expectation that they define their own course in history (which is the reward of our liberty). To accomplish this objective, to assume her inherited role, America must simultaneously acknowledge her obligations to Indians and forswear all special powers over Indians.

I have taken you seriously, Yamel. I hope you will find me no less so, and,

Sincerely,

William B.Allen
Chairman

enc. 1. Letter of Chairman Reno Johnson to Chairman Allen, March 21, 1989 (Appendix A)
2. Statement by Normand and Nadine Desrochers (Appendix B)
3. Memorandum on Commission's Jurisdiction by General Counsel William Howard, Septembmer 2, 1988 (with addendum) (Appendix C)
4. Draft Memorandum on ICRA Report by Chairman Allen, August 1988 (Appendix D)

NOTES

* Mr. Chairman, in your letter of April 6, 1989, you note that the accounts of my interview with Lalita Altaha "which have appeared in the press or otherwise [been] presented to this Committee are sometimes in conflict and frequently appear to be factually erroneous." You state that "it would appear to be in the best interests of all concerned that a full record of this event . . . be put on the record." I cannot agree more. So far as I have been able to ascertain, not one of the accounts, save for my own, is completely correct, and most are substantially incorrect. Even the account prepared by Senior Counsel for this

Committee contains numerous errors, and had to be corrected with several "updates." A brief listing of some of the errors will prove useful:

"Accompanied by four cars" -- there were 3 vehicles.

"with 14 people" -- there were nine altogether.

"Commissioner Allen went onto the school bus" -- I did not.

"and removed the girl from the bus" -- no one removed the girl from the bus.

"apparently against her will" -- Lalita descended from the bus voluntarily.

"and placed her in one of the cars" -- Lalita entered Dr. Goodfield's car freely.

"and drove off with the girl" -- Dr. Goodfield was driving the car with Lalita in the passenger seat. I was in a pursuing vehicle, the same vehicle in which I had arrived on the reservation.

The NBC news crew allegedly was "working with or in some manner associated with Tom Brokaw's program operations." -- The crew was under the direction of Martin Phillips, an NBC documentary producer not directly affiliated with the NBC News program or with Tom Brokaw.

Thurza Altaha "somehow succeeded in blocking the road [we] were going to travel" -- She turned off the road, leaving our path unimpeded if we had intended to leave the reservation without taking Lalita home.

"and apparently stopped the group" -- We aimed to meet Mrs. Altaha and to deliver Lalita safely. We were not stopped.

"and got the girl back." -- After a brief conversation we left Lalita in the custody of her mother.

"the Arizona State police stopped all four cars" -- State police and Sheriff's officers stopped two vehicles.

"and placed all 14 of the people in the group under arrest" -- seven people were taken into custody, none arrested.

"They were detained at the local jail for three hours -- from 6:00 p.m. to 9:00 p.m." -- actually, it was five hours, until nearly 11:00 p.m.

"and apparently all in the party, including Commissioner

Allen and the two U.S. Marshals, were charged with some offense." -- No charges were filed. No bookings were made. The U.S. Marshals were never taken into custody. (This was corrected in the "Third Update".)

"the Arizona State Police seized these films as evidence in any proceedings that might be brought." -- They seized neither films nor any other personal possessions. Please note, further, that this purported "fact" flatly contradicts the last purported "fact" in this list!

"As a follow up to the above note, I called the office of Claudine Bates Arthur to get more details on the above. The facts are essentially as stated." -- Ms Arthur was not witness to any of the events related. Nor did Counsel, in preparing his memorandum, contact the Commission or my office to get more "details on the above."

"From the news release, . . . it is also clear that Commissioner Allen was not alone in boarding the bus." -- No one boarded the bus. Dr. Goodfield poked his head in the doorway.

"the release indicates that <u>five</u> men boarded the bus to remove Lalita" -- not one, and certainly not five, men boarded the bus.

"and that she was hysterical." -- Lalita did begin to weep immediately as she viewed the picture of her dog that Dr. Goodfield showed to her. She never became hysterical.

"among the participants was an attorney from the American Civil Liberties Union" -- Not one of the participants identified himself to me as an attorney or as from the ACLU.

"among the people accompanying Dr. Goodfield was an attorney from South Africa" -- Clearly the most far-fetched of a long series of wild charges! No one in the party was from South Africa, nor are national origins even relevant, to my mind. Perhaps the party responsible for this charge recollected that a news crew from South Africa did indeed film the Commission's public hearings in Rapid City, South Dakota in 1986. I do not know why South African television had such an interest in these hearings, unless they wish to make the claim that Indian reservations are America's apartheid.

"Commissioner Allen called the Attorney General of the United States for assistance." I called the Commission's Director of Congressional and Public Affairs, who also serves as the White House liaison. He in turn contacted the night watch of the FBI. It should be noted further, that I made this call only after three hours of custody had passed,

without visible evidence of action being taken one way or the other, when the purported FBI agents "arriving from Phoenix" still failed to materialize, and when, finally, it seemed that something more than good will might be required.

"Commissioner Allen showed [the Marshals] a copy of a statute that provides the United States Marshals shall provide assistance to the Civil Rights Commission 'upon request'." -- This is a fabrication. I neither showed any such document, nor requested any official assistance from the Marshals at the outset.

"Commissioner Allen refused to let [the police] look at the tapes, saying that they could see it on national television." -- This is a fabrication. I at no time had custody of any tapes, nor was ever asked for permission to view any.

As you may discern, I would be happy to see the record set straight. I have submitted my summary of the events of that day (Appendix E), which I trust will become a part of the formal record. I also now submit (Appendix F) a subject compilation of the various statements I have made concerning the event, so that you can see that my accounts have been consistent. I should be happy to take any questions at the conclusion of my testimony if you retain any doubts about those statements. I must say, though, that I find it extremely odd that none of the other witnesses to, or participants in, the events of 7 February have been called to testify before your Committee. It is a little remarkable to witness a Committee of the Senate of the United States treating hearsay reports on a par with the sworn testimony of an eyewitness.

You and your staff have also expressed particular interest in the "employment" of Dr. Goodfield by the Commission. I trust that the documents provided to you by Commission staff have answered your questions, but I must emphasize that Dr. Goodfield was never "employed" by the Commission. The Commission contracted with Dr. Goodfield's company to prepare background information on certain Indian Child Welfare Act cases. He prepared such background information, and the information proved useful in preparation for the July 1988 hearing in Flagstaff. His report, however, does not necessarily reflect the views of the subcommittee. It rather served to elicit some of the sworn testimony obtained during the hearing itself, and which is the more valuable part of this process.

Underlying Circumstances

Your letter of April 6, 1989, also inquires about the "underlying circumstances that led" to my trip to Whiteriver.

Your letter of April 11, 1989, expands the inquiry "to consider the propriety of the Commission's involvement in this case, the manner in which its investigation was conducted, and the objectives the Commission or the Chairman sought to achieve. It is appropriate, therefore, that I provide over and above other references a history of the Commission's project on enforcement of the Indian Civil Rights Act.

The Commission's study into enforcement of the Indian Civil Rights Act of 1968 was begun in 1985. The investigations and hearings by the Commission Subcommittee responsible for the study comprise the most extensive factfinding conducted on the status of civil rights on Indian reservations since the Congressional hearings in the 1960s that led to enactment of the Indian Civil Rights Act. In significant part, this factfinding is set forth in the transcripts of the Subcommittee's hearings in Rapid City, South Dakota; Portland, Oregon; Washington, D. C.; and in both Flagstaff and Phoenix, Arizona.

In all, one hundred and seventy-eight persons have testified before the Subcommittee. Witnesses included numerous tribal judges and council members, Assistant Secretary for Indian Affairs Ross Swimmer and other representatives of the Department of the Interior, United States Attorneys from South Dakota, New Mexico and Minnesota, Indian law scholars, lay advocates, and attorneys who practice before tribal courts. Included also were numerous Indians who sought recourse to the Commission to complain of tribal government violations of their civil rights, testimony essential to a legitimate examination of the status of civil rights in Indian Country.

The Commission's examination of the status of civil rights on Indian reservations formally began in July 1985, when the Commissioners adopted a written project proposal authorizing further development of the study. Relevant to the study's origins is advice given at that time to the Commissioners that their examination of tribal government administration of justice would serve as a sequel to a 1981 Commission report, "Indian Tribes: A Continuing Quest for Survival." That report found shortcomings in the Federal Government's administration of justice on Indian reservations but did not address whether the civil rights of American Indians were being violated in the administration of justice by their own tribal governments.

The proposal adopted by the Commissioners further expressed their concerns. Noting that the Supreme Court's decision in 1978 in Santa Clara Pueblo v. Martinez rendered the ICRA largely unenforceable in the federal courts, the proposal states that there followed numerous allegations of ICRA violations. The Civil Rights Division of the U.S. Department of Justice was continuing to receive ICRA complaints, though because of Martinez it could not act upon them.

The factfinding called for by the proposal was subsequently expanded to include a briefing for the full Commission, followed by two Subcommittee hearings. Participating in that briefing, at the Commissioners' monthly meeting on February 11, 1986, were James Schermerhorn, Special Litigation Counsel in the Civil Rights Division of the U.S. Department of Justice; Joseph A. Myers, Executive Director of the National Indian Justice Center; and Lorraine Rousseau, Chief Judge of the Sisseton-Wahpeton Sioux Tribal Court and representative of the Plains Tribal Court Judges Association. Others, such as Suzan Shown Harjo, Executive Director of the National Congress of American Indians, Robert Fast Horse, Chief Judge of the Oglala Sioux Tribal Court, and your own Peter Taylor, were invited but did not attend.

In asking that briefing participants suggest sites for the Subcommittee hearings, the Staff Director explained that the Commission desired to hold one hearing at a site where the tribal justice system was functioning smoothly and a second hearing where the contrary was the general perception. The panelists responded that tribal justice systems perceived to be functioning well included the Umatilla, Warm Springs, Gila River, Salt River, Navajo, Colorado River, Acoma Pueblo, Flathead, and Sisseton-Wahpeton Tribes. With regard to one that was not functioning well, only the Rosebud Sioux's administration of justice was suggested.

The eventual selection of hearings sites in Rapid City and Flagstaff conformed to the Commission's stated intentions. Rapid City was chosen for its proximity to the Rosebud, Cheyenne River, and Oglala Sioux Tribes. These tribes were chosen because of the general perception that their tribal governments were not properly enforcing the ICRA. Flagstaff, on the other hand, was selected for the second hearing because of its proximity to the Navajo and Zuni Pueblo Tribes and because the Navajo judicial system was reputedly the best in Indian Country. In addition, the Subcommittee later determined to convene hearings in Portland, to receive testimony from numerous tribal judges in the Northwest; in Washington, D.C., to examine the ICRA enforcement role of the Bureau of Indian Affairs; again in Flagstaff, to examine alleged ICRA violations and more fundamental issues arising out of Indian Child Welfare Act cases, as well as unrelated allegations of threats to the independence of the Navajo judiciary and the effect on ICRA enforcement of recent amendments to the Navajo Tribe's sovereign immunity act; and, finally, in Phoenix, to receive the testimony of three members of the Navajo judiciary on the issue of judicial independence from tribal council interference.

The Subcommittee's hearings revealed generally two kinds of ICRA enforcement problems: those involving alleged violations of particular provisions of the ICRA and those involving systemic

problems. The systemic problems consist of insufficient training or funds for tribal courts; tribal council interference with judicial decision making; and assertions of sovereign immunity to suits, even for equitable relief, against tribal officials for alleged ICRA violations. Examples of particular problems, on the other hand, are alleged illegal searches and seizures, denials of the right to counsel, ex parte hearings, unavailability of the right to a jury trial, violations of freedom of the press, violations of due process and equal protection, cruel and unusual punishments, and police brutality. This Committee's current Minority Counsel even testified at the August 1987 hearing in Flagstaff as to possible ICRA violations occurring at the hands of the Navajo Tribal Council:

> I personally do not believe that Judge John and Judge Lynch were accorded due process of law in terms of being apprised of the nature of the charges against them and in terms of being provided an opportunity to respond to those charges.

Mr. Chairman, these and countless other allegations of civil rights violations convinced the Commission Subcommittee to continue with this study. We should not tolerate such violations anywhere in this nation of ours, and where they have the added force of the sanction of law, it often takes extraordinary efforts, sometimes confrontational and controversial efforts, to eliminate or at least to expose those violations. I believe that the Commission on Civil Rights was established to perform precisely that function.

This is the charge that this Commission has undertaken since its inception in 1957. It has not shied away from the controversy, but has rather sought to protect the rights of American citizens wherever it finds them being violated. The Commission was given the subpoena power to ensure that it heard the full story before issuing its findings and recommendations. This is a position which you acknowledged yourself, Mr. Chairman, in a letter to my predecessor, Clarence Pendleton, dated September 10, 1987, in which you agreed, "that officials of tribal governments are no more immune from the subpoena authority of the Commission than are officials of state governments."

There are today many questions about this Commission's jurisdiction in such matters. The General Accounting Office has not yet issued the report required of them by your amendment to the Commission's appropriation bill last year. However, I must tell you that the Commission itself has been clear about its jurisdiction in this matter all along. I have already submitted to you a lengthy memorandum by our General Counsel outlining our position. But there are also questions about the uniqueness of the relationship between Indian tribes and Congress.

It would be well to have your cooperation. Ever since Peter Taylor declined to attend the Commission's initial briefing on this study in February 1986 (and before I was even on this Commission), we have received more in the way of hurdles than of cooperation from this Committee. As we prepared for our first hearing in Flagstaff in 1987, we were surprised by the lack of cooperation we received from the Navajo, having been invited to hold the hearing by none other than Navajo Chief Justice Tom Tso. We were more surprised, however, when Senator DeConcini called to intercede on behalf of the Navajo, asking if a scheduled pre-hearing trip could be postponed, in order that a "consulting relationship" could be developed. We attempted to elicit cooperation from the Navajo, and thought Navajo officials would be in Flagstaff to testify until the Navajo government issued a press release the day before the hearing.

Mr. Taylor's summary of that hearing is further evidence of a bias by this Committee that may explain the lack of cooperation heretofore. As Chairman Pendleton stated at the time, your letter of September 10, 1987, was based on "inaccuracies" in that staff synopsis, and the full transcripts are readily available to set the record straight.

Last summer's amendment to our FY 89 appropriation is a powerful example of the way in which you have helped to foster a disposition not to cooperate. After well more than a year of effort on the part of the Commission staff to complete the record undertaken in the first Flagstaff hearing, we thought it necessary to issue subpoenas to Navajo officials. When the officials failed to comply with those subpoenas, we issued written interrogatories so as to accommodate their stated concerns, and extended the time limit for a reply by thirty days. Your amendment, which would have prevented our enforcing those subpoenas, makes a mockery of the Commission's subpoena power, and of the Commission itself. It conveys the message that there is a special friend who can draw a protective cordon around those whom the Commission would question. I ask you to consider the propriety of such arrangements in the parallel case, had Congress prevented the enforcement of subpoenas issued to obtain documents from Judge George Wallace in the early 1960s.

Mr. Chairman, I happen to believe strongly in the equal rights of citizenship for all Americans. I do not believe that Congress or anyone else has the right to deny the protections of the Constitution to any citizen in this land, once citizenship has been granted. I believe further that there are even rights so fundamental that they cannot legitimately be denied no matter what the status of one's citizenship. I recognize that Congress claims today the power to do precisely that, but I vehemently deny that it has the right to do it.

Mr. Chairman, Congress in 1957 established a Commission on

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Civil Rights in such a way as to be able to tackle the most difficult issues about American citizenship. In those days, the Jim Crow regime had erected barriers so high as to deny to most American blacks the guarantees of the Constitution and the benefits of American citizenship. Today, the century-old confusion about the Constitutional status of the American Indian similarly denies to those individuals the full promise of American citizenship. We can no more tolerate the one to continue than we could the other to reassert itself. I have sought the cooperation of those whose peculiar plight is the subject of this Commission study. I have urged upon my colleagues that this is an issue which goes to the very heart of American citizenship. I beg you and your colleagues in Congress to join with me in resolving this contradiction in our laws, and to once and for all extend the promise of citizenship to all who are born or naturalized in the United States, and subject to its jurisdiction. If my five hours in the Gila County Jail can produce such a dialogue, then I would think them the best five hours I have spent since I was appointed to serve on this Commission.

** Indian Child Welfare: A Status Report, "Final Report of the Survey of Indian Child Welfare and Implementation of the Indian Child Welfare Act and Section 428 of the Adoption Assistance and Child Welfare Act of 1980," prepared by CSR Incorporated (Washington, D. C.) and Three Feathers Associates (Norman, OK) for the Administration for Children, Youth and Families, U. S. Department of Health and Human Services and the Bureau of Indian Affairs, U. S. Department of the Interior, April 18, 1988.

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MAR-24-1989 13:04 FROM STAFF DIRECTOR'S OFFICE TO CRI P.02

APPENDIX A

E-82

EXECUTIVE OFFICE OF THE CHAIRMAN

WHITE MOUNTAIN APACHE NATION

Reno Johnson, Sr.
Tribal Chairman

89 MAR 24

Reno Johnson, Sr., Chairman
WHITE MOUNTAIN APACHE TRIBE
P.O. Box 1690
Whiteriver, AZ 85941

March 21, 1989

William B. Allen, Chairman
United States Commission on
Civil Rights
1121 Vermont Avenue, N.W.
Washington, D.C. 20425

Dear Mr. Allen:

I am responding to your February 26, 1989 letter. At the outset let me say that contrary to your assertions, I do not believe that I have been mislead about the activities which you engaged in and which occurred on the White Mountain Apache Tribal Homeland on February 7, 1989. For your information, before the White Mountain Apache Tribe responded to the incident, I sought detailed information from the White Mountain Apache Police, the Bureau of Indian Affairs Office of Law Enforcement and Special Investigations, and the U.S. Marshals who were involved in the incident. Like you, I believe that records do exist with which independent persons might establish the factual events of February 7, 1989. I trust that with time and with the aid of others besides you and I who obviously have our particular points of view, we will ultimately arrive at a clear interpretation of the essential facts.

I.

With respect to the Flagstaff hearings you refer to and which were held in July, 1988, I must state that I disagree with your statement "that the Apache Nation has opposed an absolute barrier to formal inquiries of the Tribe". To my knowledge, the White Mountain Apache Tribe has never been formally invited to respond to "formal inquiries of the Tribe". Please send me copies of any correspondence you have which show

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MAR-24-1989 13:04 FROM: STAFF DIRECTOR'S OFFICE TO CRI: P.02

either your request for formal inquiries or the White Mountain Apache Tribe's response indicating "opposition" or "an absolute barrier".

With respect to the hearings themselves, please note on Page 65 of the Transcript of the Hearings before the United States Commission on Civil Rights Enforcement of the Indian Civil Rights Act held in Flagstaff, Arizona, July 20, 1988, your own words:

> "I would like to call forward at this time the panel consisting of Steve Ungar, Claudeen Arthur, and Deborah Leon, are they all present? While we are assembling, we will say to the rest of you, that we will now discuss the Baier case" (Emphasis Added).

Note on Page 65, Ms. Arthur's statement, "that the White Mountain Apache Tribe is not here to testify specifically as such"; (i.e. on the Baier case), she stated, "we will respond to those allegations that may or may not be raised by Mr. Ungar in this particular case". Also on Page 66 Ms. Arthur further states, "That the White Mountain Apache Tribal Court proceedings are privileged and that our Social Services act is under a federal contract which binds us by the Privacy Act so we would not be able to discuss those things". Ms. Arthur goes on to say, "I said we could not talk about the White Mountain Apache Tribal Court hearings". As you were aware in July, the Baier case is a disputed and currently pending child custody proceeding, involving the Indian Child Welfare Act.

In addition to these clear statements on July 20, 1988, that it was specifically the Baier case into which you wished to make your inquiry and Ms. Arthur's appropriate objection with respect to confidentiality and the Federal Privacy Act, your own agenda for that date indicates that the Indian Civil Rights Act would be discussed in relation to "The Matter of Michelle Rae Dawn Baier". To my knowledge, the conversations between Brian D. Miller and Ms. Arthur also related to testimony directed particularly at the Baier case.

At no time did I receive or did the White Mountain Apache Tribe receive a request that testimony be given generally about civil rights on the White Mountain Apache Tribe's Reservation or relative to the Tribal Courts or the White Mountain Apache Tribe's judicial system. The only contact of which I am aware is that of Mr. Miller advising Ms. Arthur by telephone that Steve Ungar, the opposing attorney in the Baier case intended to testify in Flagstaff before the Committee and inviting Ms. Arthur to appear. A few days before the hearing,

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Ms. Arthur did get a letter confirming her conversation with Mr. Miller. Ms. Arthur accepted that invitation for the specific purpose of "responding to those allegations that may or may not be raised by Mr. Ungar in this particular case". (Transcript Page 65). Note also on Page 87 of the transcript, Ms. Arthur's statement, "You invited me here so I could respond to Mr. Ungar" and further, "Mr. Miller and I agreed what I was going to testify too, and that is what our agreement has been".

It is true that the White Mountain Apache Tribal Attorney opposed disclosing the child's court records in the Baier case for the specific reason that such child related court records are by their nature confidential and waivers of confidentiality were not received from all the parties involved. Furthermore, because many of those records are obtained through the implementation of programs funded with federal appropriations, such records are subject to the Federal Privacy Act. The White Mountain Apache Tribe is simply not in a position to breach the confidentiality of the parties concerned or to proceed in disclosing information in violation of the Federal Privacy Law without appropriate waivers.

Since the question of the White Mountain Apache Tribe responding to Commission inquiries on other matters has never arisen, I cannot at this time do more than disagree with your statement "That the Apache Nation has opposed an absolute barrier to formal inquiries of the Tribe". This statement is simply not correct. No formal inquiries from the Civil Rights Commission to the White Mountain Apache Tribe, other than into the Baier case, have been made. To infer that the Commission's experience in discussing the particulars of the Baier case constitutes a general denial of or an opposition to inquires from the Commission to the White Mountain Apache Tribe is a completely insupportable inference.

II.

It seems apparent that there is a complete lack of understanding on the part of many, many persons in relation to the legal positions and actions in this matter, thus, I wish to clarify the legal proceedings regarding the child involved in the February 7, 1989 incident:

The White Mountain Apache Tribe was not the plaintiff in the Arizona Superior Court proceedings filed in 1980 and 1981. The original proceedings involved the mother and the Deroeschers. It was the Arizona Court which found that

(1) On December 10, 1976, Judge Early of the White Mountain Apache Tribal Court was in Tucson, Arizona to pick up

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MAR-24-1989 13:06 FROM STAFF DIRECTOR'S OFFICE TO CPI P.05

the child pursuant to a temporary custody order of the Tribal Court dated December 8, 1976;

(2) The Deroeschers, after being informed of Judge Early's presence in Tucson and the Tribal Court order stated to a third party that they "were gone". The Deroeschers evaded the Tribal Court order by fleeing to Texas on December 11, 1976;

(3) The Pima County Court stated, "By going to Texas after being advised of the Tribal Court order, Respondents (Deroeschers) were in effect, fleeing in the face of that order and were attempting to avoid its possible effects.

(4) Further, the Arizona Court found that, "The Respondents, (Deroeschers), went to Texas to effect an adoption there so as to avoid proceedings in the courts of Arizona and the White Mountain Apache Tribe.

(5) The Arizona Court also found, "Respondents, (Deroeschers), act in representing to the Texas Court that they and the child were legal residents of Texas is extrinsic fraud which denied Petitioner (Thurza Altaha) and the child the protection of the laws of Arizona".

(6) Finally, the Court found "The Texas termination and adoption decrees are void and will not be granted full faith and credit because they were entered without subject matter jurisdiction and is a result of an extrinsic fraud".

These statements were statements not of the White Mountain Apache Tribe, but of the State of Arizona's Judicial System. While the White Mountain Apache Tribe did not institute the Arizona Court proceedings; after the proceedings were underway the White Mountain Apache Tribe did intervene and participate in the case. At the time of the above recited findings by the Arizona Court, January 5, 1982, the child was barely eight (8) years old. As in most court proceedings, generally children less than twelve (12) years of age are not asked to state their opinion concerning with whom they wish to reside. Furthermore, even when courts ask children over the age of twelve (12) what their preference is with regard to custody issues, the court is never bound by the statements of the child. If you disagree with Arizona law or the Arizona Court with regard to the child's preference, it seems you should raise that with the appropriate officials of the State of Arizona.

In the face of the Arizona Superior Court decision and the findings of fact and conclusions of law just recited and after Appellate Court Proceedings affirming the Superior Court decision, the Deroeschers again ignored valid court orders and

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fled with the child. The State of Arizona, through the Pima County Attorney's Office brought criminal custodial interference charges against the Deroeschers pursuant to Arizona Revised Statutes, Title 13, Section 1302.. A warrant was issued for their arrest and in response to the warrant, the Deroeschers appeared and subsequently pled guilty to a Class 6 felony charge. In criminal court proceedings, a child's preference with respect to custody is not at issue. Again, if you feel that matters considered at this state court proceeding should have been otherwise, then you should discuss your feelings with appropriate officials in the State of Arizona. Finally, according to the Pima County Attorney's Office, the mother of the child filed a civil suit in 1985 against the Deroeschers claiming tortious interference with custody and intentional infliction of mental distress. It is this civil suit that is presently ongoing in Pima County, Arizona State Court.

Again, as you must be aware, a civil suit alleging tortious conduct is not a proceeding in which the actual custody of the child is an issue or one in which a child would necessarily be asked to testify with respect to her custody preference. Thus, none of the court proceedings, either the initial civil complaint in which the Arizona State Court invalidated the Texas adoption decree, the criminal case in Pima County nor the ongoing civil matter pose situations relative to the preference of the child as to custody. Arguably, the Pima County Court proceedings in 1981 and 1982 might have provided an opportunity for the child to state her preference; however, any complaint related to that issue should be directed to the State of Arizona and its child custody laws and procedures not to the White Mountain Apache Tribe and its child custody laws and procedures. Subsequent proceedings have not been directly related to the issue of custody.

I have seen portions of the news clips with regard to the questions asked Lalita about depositions. Unfortunately, it appears that Lalita and subsequently, through the showing of the news broadcast, the general public were mislead to believe that the depositions which were scheduled in the civil suits filed by Ms. Altaha against the Deroeschers somehow directly implicated Lalita's preference on the custody issue when in fact the case does not address that issue at all.

Finally, on the question of Lalita's preference; although I am not a psychiatrist, nor a psychologist, it is very apparent that asking a child questions about preference relative to her present or past situation, under the circumstances and in the environment which you created on February 7, 1989 and in which you boldly participated is not indicative of anything. If you truly wanted the answers to your questions and wanted

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MAR-24-1989 13:08 FROM STAFF DIRECTOR'S OFFICE TO CRI P.07

answers without involving the White Mountain Apache Tribe, surely there were numerous other avenues available to you. It might have been appropriate for you to seek from the child's mother a release regarding confidentiality and for you to have discussed your concerns with the therapist and psychologist who have worked with the child over the period of time which she has been on the reservation.

For your information, the White Mountain Apache Tribal Social Services set up counseling services for this child in advance of her return to the reservation and have provided those services to the child and her family in the time since. It seems to me that ordinary reasonable individuals would realize that questions such as the type you posed for the news media are extremely sensitive questions more appropriately answered in a private, non-staged, non-confrontational, and non-inflamed encounter. Such inquiries surely should be made in a manner calculated to protect the child, not harm her.

I believe as you do that independent open inquiry into the events that transpired on the 7th of March will arrive at the truth. Toward that and, the White Mountain Apache Tribe has requested that the Senate Select Committee on Indian Affairs as well as the Senate Judiciary Committee, which has oversight with respect to the Civil Rights Commission, look into the matter. Both you and I know from Senator McCain's remarks at the NCAI meeting of March 9, 1989 that the Senate Select Committee intends to have oversight hearings with regard to this matter. I leave it in their capable hands.

Finally, my letters bringing the matter to the attention of the appropriate congressional delegations dated February 8, 1989 and our press release of February 9, 1989, did indeed contain an error of fact. The White Mountain Apache Tribe acknowledges that you, Mr. Allen, did not board the school bus and remove the child. These statements were derived from reports that we had received from other persons at the scene which subsequently proved to be incorrect. Beyond that, I stand by the statements I have made including, the statement that my office issued to the National Congress of American Indians, the press release and the letters to Congress and other appropriate authorities seeking assistance and investigations into this matter.

Sincerely,

Reno Johnson, Sr., Chairman
WHITE MOUNTAIN APACHE TRIBE

MAR-24-1989 13:09 FROM STAFF DIRECTOR'S OFFICE TO CRI P.08

cc: The Honorable Jim Kolbe
The Honorable Senator John McCain
The Honorable Senator Inouye

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APPENDIX B

We are the proud parents of Lalita Johanna Desrochers, a five year old White Mountain Apache child that we adopted on March 1, 1977, in Tarrant County, Texas by Order of the Honorable Scott Moore, Presiding Judge. The Decree of Adoption is recorded in the Records of the Tarrant County Juvenile Court at Book 105, Page 831 and 832.

Lalita first came to us when she was five months old at the request of her natural mother, Thurza Johnson. At the time Lalita was born, Thurza was unmarried, and had one other child. She never told us the identity of the father. While Thurza was an enrolled member of the White Mountain Apache Tribe, Lalita was born in the Indian Hospital in Phoenix, Arizona.

From the very beginning we treated Lalita as our own, and gave her as much love and attention as we could possibly have given any child.

After Lalita had been with us for several months, her mother requested that she be returned to the Reservation. Our hearts were broken, but knowing that she was not our child at the time, we returned her with the request specifically stated to Thurza that she take good care of Lalita.

Two weeks later we received a letter from Lalita's mother informing us that if we wanted her back we could have her. Nadine immediately went to the Reservation to retrieve our little girl. She could hardly believe what she saw when she arrived.

Lalita was dressed in the same sleeper that she was wearing when we took her back to the reservation. To describe it as "filthy" would be an understatement in that the garment had been literally turned inside out and worn on both sides rather than "washed". Lalita seemed disoriented and fearful of the Indian people that surrounded her on the Reservation. After her return to Tucson, it took several months before she responded to our loving care, and once again began to act as a normal child.

On December 13, 1976, we received a call from Officials of the House of Samuel, a Christian Child Placement Service in Tucson, Arizona, informing us that Officials from the White Mountain Apache Tribe were at the House of Samuel demanding Lalita's return. We were confused since we had previously received a letter from Lalita's mother informing us that there were people on the Reservation that wanted to kill Lalita, and that we were not to let her return to the Reservation under any circumstances. We immediately attempted to contact Lalita's mother, and after a considerable amount of difficulty found her in Dallas, Texas.

We informed Thurza Johnson that Officials from the Reservation were demanding Lalita's return. Thurza told us that she did not want Lalita to return to the Reservation, and in fact, wanted us to take care of her. We requested permission to adopt Lalita and Thurza agreed. Accordingly, we flew to Texas, engaged an attorney, and after a considerable discussion regarding Lalita's welfare with Thurza and her new husband, Hubert Goclanney, had Thurza sign papers consenting to our adoption of Lalita.

Subsequently, we moved from Tucson to Texas and completed adoption proceedings on March 1, 1977. Due to Nadine's father's illness, and Norm's inability to find suitable employment, we moved back to Tucson following the completion of the adoption proceedings.

Lalita's mother returned to the White Mountain Apache Reservation sometime during 1977. On the 23rd day of February, 1979, Thurza Johnson Goclanney filed a Petition for Writ of Habeus Corpus and Judge John Collins signed a Writ of Habeus Corpus ordering us to return the child to her mother. We were served with the Petition and the Writ of Habeus Corpus on the 28th day of February, 1979. We have been litigating the matter ever since, and in fact, the case has already been to the Arizona State Court of Appeals, and to the Arizona State Supreme Court. A trial on the merits is presently scheduled for the 21st day of January, 1980.

The theory of Thurza Johnson Goclanney's case is that she did not understand what she was signing at the time she consented to our adoption of Lalita, and furthermore, that we misled her and defrauded her at the time she signed the Consent to Adopt.

Thurza was educated in schools where the English language was the language used for all lessons, and in fact Thurza even graduated from a Nurses Aide School following high school and has

worked in hospitals as a nurse's aide in the Denver, Colorado area. We know of our own knowledge that she speaks, reads, writes and understands the English language at least as well as we do, if not better. We have many letters from Thurza, over the years in her own handwriting, written in English that are proof-positive of this statement.

Our attorney took Thurza's deposition on August 23, 1979. The deposition was difficult in that Thurza feigned an inability to speak or understand English, and the deposition had to be taken through an Apache interpreter. Her sworn statement concerning the circumstances surrounding the adoption was a total fabrication, and it saddened our hearts to think that a person that we knew and loved could tell such blatant lies about us.

Following the deposition, we took Thurza and her husband to Nadine's mother's home for a short visit with Lalita. In the car, Thurza suddenly regained her ability to speak and understand English. At the house, Lalita became hysterical when she saw Thurza. We were unable to calm her, and in fact she remained agitated and disturbed for several days following the visit. Prior to this encounter, we have noticed over the years that whenever Lalita observed any female that even remotely resembled an Apache, she would cower in fear.

On August 24, 1979, our attorney informed us that Thurza's attorney had told him that Thurza was going to file another lawsuit against us based on alleged illegal interference with the parent-child relationship existing between Thurza and Lalita. Thurza's attorney inferred that the House of Samuel would also be a defendant, and that unspecified money damages would be sought.

Thurza's attorney is an employee of the Apache Legal Aide which is funded in part by the Federal Government. Our attorney is a private attorney.

We cannot understand how the Federal Government can use our tax dollars to pay an attorney to file harassing lawsuits against us when all we have ever done is provide for, care for, and love our little girl as her mother requested us to do from the beginning. Legally, the parent-child relationship between Thurza and Lalita has been severed in Texas, and will remain severed unless Thurza's Habeus Corpus action is successful. We have not intentionally interfered in any relationship that existed between Thurza and Lalita and in fact, we have never done anything other than what Thurza requested us

to do.

Surely you can understand that fighting a lawsuit is an expensive proposition, especially when the attorney on the opposite side has an unlimited budget available with which to pursue the matter, and in fact uses Federal Funds to do it. We are therefore enlisting your aid and support in helping us fight this battle. Perhaps you know an influential person in a high place that might be able to put some pressure on the White Mountain Apache Legal Aide to drop this frivolous and harassing litigation that has unfortunately become the focal point of our lives. Perhaps National exposure to our plight will cause concerned persons to support our cause.

Our attorney can provide you with details concerning this lawsuit upon request. His name is: Leighton H. Rockafellow, 2438 East Broadway, Tucson, Arizona 85719; Telephone number: 602-792-4983. We sincerely hope that you care enough to become involved.

Sincerely,

Normand and Nadine Desrochers

3901 S. Jamie Dr.
Tucson, Arizona 85706
Telephone no: (602)-883-2763

APPENDIX C

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N W
Washington, D C 20425

September 2, 1988

OFFICE OF GENERAL COUNSEL MEMORANDUM FOR THE U.S. DEPARTMENT OF JUSTICE ON COMMISSION JURISDICTION RELATING TO ENFORCEMENT OF THE INDIAN CIVIL RIGHTS ACT OF 1968

I. INTRODUCTION

This memorandum documents and discusses Commission jurisdiction in reference to the Commission's ongoing examination of enforcement of the Indian Civil Rights Act of 1968 (ICRA). 1/ Its preparation is in response to the position

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1/ 25 U.S.C. Sec. 1301-1341 (West 1983 & Supp. 1988). Section 1302 provides:

> No Indian tribe in exercising powers of self-government shall--
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
> (3) subject any person for the same offense to be twice put in jeopardy.
> (4) compel any person in any criminal case to be a witnesss against himself;
> (5) take any private property for a public use without just compensation;

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of the Navajo Tribe that the Commission lacks jurisdiction to gather information concerning enforcement of the Indian Civil Rights Act. The position expressed by the tribe calls into question whether tribes are obliged to adhere to the Indian Civil Rights Act.

The order followed herein is to begin by describing the background of the Commission's ICRA inquiry over the past two and a half years. 2/ Section III sets forth the Commission's jurisdiction. The discussion begins on a general level, where it is pointed out that the Commission's jurisdiction in the

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(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of any offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

2/ It should be emphasized that the Commission has previously held hearings and published reports, not only on the Indian Civil Rights Act, but on other issues of importance to

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area of discrimination and denials of equal protection is coextensive with that of Congress' authority to legislate in those areas.

The discussion then shifts to the Commission's authority to examine enforcement of the Indian Civil Rights Act. There it is explained that, in authorizing the ICRA hearings, the Commissioners based them upon two of the agency's jurisdictional bases, namely, upon its jurisdiction to "study and collect information concerning legal developments," and upon its jurisdiction to "appraise the laws and policies of the Federal Government," with respect to discrimination or denials of equal protection. 3/

Section IV discusses these two jurisdictional bases in a general manner. Subsection A discusses the meaning of the "legal developments" or "laws and policies" which form the first predicate for Commission investigations based upon "legal developments" or "appraisal" jurisdiction. Subsection B discusses the meaning of "equal protection of the laws" from the standpoint of Congressional intent and Commission practice. The discussion then turns to the meaning of

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Indian Americans. See American Indian Civil Rights Handbook (1980). But see Report of Investigation: Oglala Sioux Tribe, General Election, (1974); Employment Practices in Montana: The Effects on American Indians and Women (1974); Hearings on American Indian Issues in the State of South Dakota (1978); Staff Report: South Dakota Indian Hearing (1978); Hearing on FBI Investigation: Indian Reservations and Police Abuse (1979); and Indian Tribes: A Continuing Quest for Survival.

3/ 42 U.S.C.S. Sec. 1975c(a)(2&3) (Law. Co-op. 1986).

"discrimination" as that word appears in the agency's "legal developments" and "appraisal" jurisdiction.

Section V examines the meaning of "administration of justice," a term appearing in the agency's "legal developments" and "appraisal" jurisdiction and which is the major focus of the Commission's activities in monitoring ICRA enforcement.

Finally, Section VI applies the general analysis contained in Sections III, IV, and V to the facts underlying the Commission's ICRA inquiry. The arguments therein are not exhaustive.

II. BACKGROUND

The Commission's ICRA enforcement study began in January 1985 with the adoption of a project concept by the Commissioners. 4/ Adoption of the project concept was followed by Commissioner approval of the project proposal at their monthly meeting in July 1985, 5/ and approval of the project design at their monthly meeting in December 1985. 6/

At the Commissioners' monthly meeting in February 1986, the Commissioners received a briefing on ICRA enforcement from James Schermerhorn, Special Litigation Counsel for the

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4/ Generally, Commission projects begin with the Commissioner adoption of a project concept, setting forth the outlines of a proposed project. This is followed by Commissioner adoption of a project proposal, describing the project in greater detail. A project design, which provides even greater detail, is the third step in the process. In this instance, the project concept was adopted by the Commissioners with one abstension. Commission Meeting Transcript, Jan. 9, 1985.

5/ The vote was unanimous. Commission Meeting Transcript, July 11, 1985.

6/ The vote was again unanimous. Commission Meeting Transcript, Dec. 10, 1985.

Department of Justice, Joseph Myers, Executive Director of the National Indian Justice Center, and Lorraine Rousseau, Chief Judge of the Sisseton-Wahpeton Sioux Tribal Court. 7/

In June 1986, the Commissioners unanimously approved a resolution establishing a Commission Subcommittee to hold hearings on ICRA enforcement. 8/ The interest of the Subcommittee is in the ten year period since 1978. That year, the Supreme Court held in Santa Clara Pueblo v. Martinez 9/ that, with the exception of writs of habeas corpus, Congress intended that ICRA claims be reviewable only in tribal forums and no longer in the federal courts.

Tribal governments are not bound by the constitutional limitations on the federal or state governments unless Congress legislatively imposes such limitations. This rule has been repeatedly affirmed by the Supreme Court, 10/ and, in fact, relied upon in Martinez, where the Court stated that, "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." 11/ The purpose of the ICRA, then,

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7/ Commission Meeting, Feb. 11, 1986.

8/ Chairman Clarence M. Pendleton, Jr., and Commissioner Robert A. Destro were the original members of the Subcommittee; Chairman Pendleton later added Commissioner William B. Allen. Following Chairman Pendleton's death, the Subcommittee was reconstituted, and is now composed of Chairman Allen and Commissioner Destro. The Subcommittee format was selected as a means of addressing issues in a less costly fashion.

9/ 436 U.S. 49 (1978).

10/ Talton v. Mayes, 163 U.S. 376, 384 (1896); U.S. v. Wheeler, 435 U.S. 313, 328 (1978).

11/ 436 U.S. at 56.

was to place constraints upon tribal governments similar to the constraints upon the federal and state governments contained in the Bill of Rights. Properly enforced, the Act protects all persons in their affairs with tribal governments, whether or not these persons reside on reservations. 12/ There is no question, though, that its enactment was primarily intended to safeguard the civil rights of American Indians.

The Commission's efforts to monitor enforcement of the ICRA are the only efforts made by any Federal agency or committee of Congress in the twenty years since passage of the Act. 13/

In the two and a half years since the Subcommittee began its examination, it has compiled over twelve hundred pages of testimony in hearings in South Dakota, Arizona, Oregon, and Washington, D.C. 14/

12/ According to the Bureau of the Census, in 1980 there were 691,070 persons living on reservations.

13/ It should be pointed out that before 1978, the Department of Justice litigated claims arising under the ICRA in federal court. Its ability to do so, however, ended with the Martinez decision.

Although Congress held extensive hearings prior to the ICRA's enactment, the point here is that no significant hearings on the Act's enforcement have taken place since then except the Commission's. For a discussion of the Act's legislative history and a description of the pre-enactment hearings, see Burnett, An Historical Analysis of the 1968 'Indian Civil Rights' Act, 9 Harv. J. Legis. 557, 574-602 (1972).

14/ Hearing before the United States Commission on Civil Rights: Enforcement of the Indian Civil Rights Act, Rapid City, South Dakota, July 31-Aug. 1, and Aug. 21, 1986, (hereafter Rapid City Hearing); Hearing before the United States Commission on Civil Rights: Enforcement of the Indian Civil Rights Act, Flagstaff, Arizona, Aug. 13-14, 1987 hereafter Flagstaff I Hearing); Hearing before the United States Commission on Civil Rights: Enforcement of the Indian

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In all, some ninety persons representing thirty tribes appeared before the Subcommittee. In addition, numerous other persons, tribes, and organizations have presented statements for the Subcommittee's consideration.

The Subcommittee has received two types of complaints 15/ alleging violations of the Act. The first concerns alleged violations of particular provisions of the ICRA, such as denials of due process or equal protection, police brutality, failure to inform defendants of the charges against them, unreasonable searches and seizures, denials of jury trials, or infringement upon freedom of the press. 16/ The second alleges

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Civil Rights Act, Washington, D.C., Jan. 28, 1988 (due to be published in Sept. 1988) (hereafter Washington, D.C., Hearing); Hearing before the United States Commission on Civil Rights: Enforcement of the Indian Civil Rights Act, Portland, Oregon, March 31, 1988 (due to be published in Oct. 1988) (hereafter Portland Hearing); Hearing before the United States Commission on Civil Rights: Enforcement of the Indian Civil Rights Act, Flagstaff, Arizona, July 20, 1988 (due to be published in Oct. 1988) (hereafter Flagstaff II Hearing).

15/ Commission hearings normally contain critical evaluations of the performance of governmental organizations and officials obligated to respect the civil rights of persons within their jurisdictions. The Commission's ICRA hearings are no exception. The Commission has necessarily received testimony critical of the actions or inactions of Federal and tribal officials, but that should in no way be construed as the Commission favoring one tribal administration over another. The Commission has received allegations of ICRA violations not only in its hearing testimony, but in telephone calls and letters.

16/ For allegations of denials of due process or equal protection, see, e.g., Rapid City Hearing, supra note 14, at 36-37 (testimony of Attorney Krista Clark, Dakota Plains Legal Services), 131-135 (testimony of Kelly Jones), 272-273 (testimony of Larry Cournoyer), 137-147 (testimony of Joan LeBeau), 160 (testimony of Bertha Chasing Hawk), 345-346 (testimony of Tribal Prosecutor Kathy Spotted Bear), 392-393 (testimony of Walter Woods), see, e.g., Wash., D.C. Hearing, supra note 14, at 59-60

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problems which are systemic in nature. These notably include the assertion of sovereign immunity as a defense against ICRA

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(testimony of U.S. Attorney William Lutz), 49 (testimony of Dennis Ickes), Appendix (exhibits submitted by Stephen Pevar, Regional Counsel-Mountain States, ACLU), see, e.g., Flagstaff II Hearing, supra note 14, at 247-249 (testimony of Mary Cleland), 258-262 (testimony of George Chavez), 271-274 (testimony of Loritta Johnson), 129-142 (see Duane Beyal's reading of the written statement of Peterson Zah), 173-175 (testimony of Deborah Leon), 98-123 (testimony of Sandy Hansen), 143 (testimony of Michael Nelson); see, e.g., Flagstaff I Hearing, supra note 14, at 3-26 (discussion of Zuni Election Dispute), 132-136 (testimony of Robert Walters), 157-159 (testimony of Attorney Robert Wilson), 215-216 (testimony of J. Tauney Bowman), 216-218 (testimony of Mrs. Stephen Chewiwi), see, e.g., Portland Hearing, supra note 14, at 224-229 (testimony of Attorney William R. Goode).

For allegations of police misconduct, see, e.g., Rapid City Hearing, supra note 14, at 78, 80, 82 (testimony of Imogene High Elk), 84 (testimony of Edna Thompson), 151 (testimony of Gilbert LeBeau), 46 (testimony of Lay Advocate Elma Winters), 334 (testimony of Marvin LeCompte), 109-117 (testimony of Marvin Stoldt); for allegations of failure to inform defendants of the charges against them, see, e.g., Rapid City Hearing, supra note 14, at 124 (Trudell Duerue, Former Chief Judge of the Rosebud Tribal Court, testified that over 300 people were arrested within a 4-5 month period without charges being filed), 84 (testimony of Edna Thompson), 40 (testimony of Krista Clark), 77-79 (testimony of Imogene High Elk), 159-160 (testimony of Bertha Chasing Hawk); for allegations of unreasonable searches and seizures, see, e.g., Rapid City Hearing, supra note 14, at 98-99 (testimony of Ray Springer), 171-172 (testimony of Tribal Prosecutor Vincent Brewer), 212-213 (testimony of Tribal Judge Robert Fast Horse), 45 (testimony of Lay Advocate Elma Winters); for alleged denials of jury trials, see, e.g., Rapid City Hearing, supra note 14, at 98 (testimony of Ray Springer), 163 (testimony of Bertha Chasing Hawk); for an alleged violation of freedom of the press, see, e.g., Flagstaff I Hearing, supra note 14, at 169-200 (re the closing of the Navajo Times Today); for allegations of denial of right to counsel, see, e.g., Flagstaff I Hearing, supra note 14 at 40-42 (testimony of Allen Toledo).

claims 17/ and interference with tribal judiciaries by tribal council members. 18/

17/ Cheyenne River Chairman Morgan Garreau testified at the Subcommittee's Rapid City Hearing, for example, that the Cheyenne River Sioux Tribal Council asserts the defense of sovereign immunity as a matter of course to claims based upon the ICRA. Rapid City Hearing, supra note 14, at 377-378. Tribal Judge David Harding testified: "Right now, if you go--if you have what you feel is a violation of your right, and the defense of sovereign immunity is successfully raised, you're sunk. It doesn't matter how much anxiety, how much hurt has been caused to you, how much disgrace, or whatever it might be. You're sunk." Portland Hearing, supra note 14, at 62. See also Rapid City Hearing, supra note 14, at 126 (testimony of Trudell Guerue), 355-356 (testimony of Judge Melvin Garreau), 38 (testimony of Attorney Krista Clark, Dakota Plains Legal Services); Washington, D.C. Hearing, supra note 14, at 85 (testimony of Stephen Pevar, Regional Counsel-Mountain States, ACLU, regarding Oglala Sioux Tribal Council Resolution No. 87-76); Flagstaff I Hearing, supra note 14 at 99 (testimony of Charley John), 145-149 (testimony of Attorney F. Douglas Moeller), 149-166 (testimony of Attorney Robert Wilson); Flagstaff II Hearing, supra note 14, at 124-127, 134-135, and 143.

18/ See, e.g., Rapid City Hearing, supra note 14, at 139-140 (testimony of Joan LeBeau), 148-149 (testimony of Gilbert LeBeau), 354-356 (testimony of Judge Melvin Garreau), 368 (testimony of Judge Nancy Condon), 120 (testimony of Trudell Guerue), 344-346 (testimony of Kathy Spotted Bear), 392-393 (testimony of Walter Woods); Flagstaff I Hearing, supra note 14, at 7 (testimony of Jobeth Mayes), 14 (testimony of Margaret Wilson), 94 (testimony of Charley John), 123-129 (testimony of Navajo Lay Advocate Daniel Deschinny), 40 (testimony of Attorney Allen Toledo), 82-93 (testimony of Attorney Richard Hughes regarding the formation of the Supreme Judicial Council), 108-111 (testimony of Attorney Eric Eberhard regarding the formation of the Supreme Judicial Council); Portland Hearing, supra note 14, at 45, 59-60 (testimony of Tribal Judge David Harding), 219-221 (testimony of Tribal Judge Don Sollars); Flagstaff II Hearing, supra note 14, at 144 (testimony of Attorney Michael Nelson), 175-177, 188-190 (testimony of Deborah Leon); Washington, D.C. Hearing, supra note 14, at 84-85 (testimony of Stephen Pevar, Regional Counsel-Mountain States, ACLU, regarding Olala Sioux Tribal Council Resolution No. 87-76).

In preparation for its hearing in Flagstaff, Arizona, on July 20, 1988, the Subcommittee subpoenaed several persons to provide testimony. 19/

These persons included six Navajo officials, Chief Justice Tom Tso, Navajo District Judges Robert Yazzie and Wayne Cadman, Assistant Attorney General William Riordan, Navajo Department of Justice attorney Violet Lui, and Lay Advocate Louise Grant. None of these persons appeared and gave testimony.

The Subcommittee released the latter three of responsibilities to comply with the subpoenas, and only remains interested in obtaining the testimony of the three judges. Written questions were supplied to the judges on August 9, 1988. The thrust of the Subcommittee's interest is not only in general matters of ICRA enforcement by their courts, but in allegations that the independence of the Navajo Judiciary has been threatened by other tribal government officials.

19/ The Subcommittee had also held a hearing in Flagstaff on Aug. 13-14, 1987, to examine ICRA enforcement by the Zuni Pueblo and Navajo tribes. On that occasion, the Subcommittee invited, rather than subpoenaed, the Navajo officials it desired to hear testimony from. The officials either refused, or were denied permission, to attend the hearing. Thus, the decision by the Subcommittee to issue subpoenas the following year was prompted in part by the Navajo government's unwillingness to cooperate the year before and in part by a Subcommittee concern that, with respect to the Navajo judges it desired to hear testimony from, their willingness to testify not be interfered with by the Navajo executive branch. In fact, the Subcommittee subpoenaed the judges because it had received reliable allegations that judicial independence had been threatened by tribal council members.

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The arguments advanced by the Navajo Tribe with respect to the Subcommittee's desire to receive the testimony of the three judges are basically twofold. The first, interposed on behalf of the judges by the Navajo executive branch, is that the judges are judicially immune from giving testimony. The second is that the Commission lacks jurisdiction to monitor implementation of the Indian Civil Rights Act.

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The power of the Commission to issue subpoenas is expressly conferred by 42 U.S.C.S. Sec. 1975d(f) (Law. Co-op. 1986). An express limitation on this power is geographical. Id. at Sec. 1975a(k); see also the Commission's regulations at 45 C.F.R. Sec. 702.4(c) (1986). The Commission's broad subpoena power has been upheld in the courts. See Hannah v. Larche, 363 U.S. 420 (1960); In re Wallace, 170 F. Supp. 63 (D. Ala. 1959); U.S. v. O'Neill, 619 F.2d 222 (3d Cir. 1980).

An objection may be raised that the Commission's exercise of its subpoena power constitutes an impermissible impingement upon tribal sovereignty. Although no court has ruled on this issue, at least one court has addressed an analogous issue: whether the Commission's exercise of its subpoena power violates State sovereignty. In re Wallace, 170 F. Supp. 63, 67-68 (D. Ala. 1959). After finding that Congress has authority to grant the Commission jurisdiction and subpoena power, the court in Wallace held that Congressional authority was supreme to claims of State sovereignty, and, therefore, rejected any claim of State sovereignty. Id. Similarly, because Congress has plenary power over Indian nations, its grant of jurisdiction and subpoena power to the Commission is likewise supreme to any claim of tribal sovereignty.

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It may also be argued that Indian nations should be considered foreign nations within the United States. This argument, although occasionally made by tribes, has never been seriously considered by the courts because the legal status of Indian tribes will not support such an argument.

Indian tribes occupy a unique status under our law. United States v. Wheeler, 435 U.S. 313, 323 (1978). They are "domestic dependent nations." Johnson v. McIntosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832). As the Supreme Court has stated: "These Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . Dependent for their political rights." Kagama v. United States, 118 U.S. 375, 383-84 (1886)(emphasis in original). As to their current status, the Supreme Court recently stated: "Today, however, the power of the Federal Government over the Indian tribes is plenary. Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes." National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 851 (1985). The Federal government's plenary power over Indian tribes and grant of national and state citizenship to Indians are wholly inconsistent with the view that Indian tribes are foreign nations within the United States.

Even if Indian nations were to be considered foreign nations, members of Indian nations would still be subject to the Commission's subpoena power as United States citizens. The United States Supreme Court summarized the general law concerning the ability of the United States government to subpoena its citizens resident in a foreign country. The Court stated: "[T]he United States possesses power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal. . . . It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned." Blackmer v. United States, 284 U.S. 421, 437-438 (1932).

Thus, even if Indian nations were considered foreign nations (and they are not), United States citizens would still be subject to the subpoena power of the United States, and expressly the subpoena power of the courts of the United States. 28 U.S.C.A. Sec. 1783 (West Supp. 1988); see United States v. Lansky, 496 F.2d 1063 (5th Cir. 1974).

The claim of judicial immunity is based upon a concern that the judges would be called to testify on matters pending before their courts. The concern is simply without basis. 20/

The arguments made by the Navajo government that the Commission lacks jurisdiction hinge upon an untenable interpretation of Santa Clara Pueblo v. Martinez and an improper reading of the Commission's jurisdictional grant.

20/ See letter of July 18, 1988, from Chairman William B. Allen to Chief Justice Tom Tso (reiterating that Commission staff had explained to him that he would not be called upon to testify concerning pending matters). See also the letter of August 3, 1988, from Chief Justice Tso to Chairman Allen, which states, in part:

> The Commission indicated that we would not be asked to comment upon pending cases or render advisory opinions. I was also told that we would not be asked any questions which would require us to violate the Code of Judicial Conduct. The Commission said it wanted only to ask about alleged threats to the independence of the judiciary.

See also the written interrogatories of August 8, 1988, provided to the three judges following their noncompliance with the subpoenas as the best evidence of the questions the Commission intended to propound to them. The questions put to the judges include specific questions relating to alleged attempts by tribal council members to intimidate judges into ruling a certain way; whether the Navajo judiciary has ruled on the applicability of the ICRA to the Navajo tribal government; whether the Navajo judiciary has ruled on the validity of the defense of sovereign immunity to ICRA claims for equitable relief; the number of ICRA complaints filed in the Navajo court system; and any reported decisions addressing the relation between the ICRA and the Navajo bill of rights.

In a statement submitted for the record of the Subcommittee's July 1987 Flagstaff hearing, the Navajo Tribe made the following argument:

> The Commission is authorized to investigate discrimination or denial of equal protection of the laws "under the Constitution." Indian tribes do not, however, derive their authority from the Constitution, rather their governing authority is an inherent attribute of their sovereignty which predates the United States Constitution. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). Tribal governments are not subject to those restraints on federal or state governments contained in the U.S. Constitution. Id. at 56. 21/

The argument made here is that since tribes are not under the Constitution, the Commission cannot monitor them with respect to their enforcement of the Indian Civil Rights Act. The response to this is that the reference in the Commission's statute to "laws under the Constitution" should be read literally rather than contorted. Put simply, the Indian Civil Rights Act is a law under the Constitution, enacted by Congress pursuant to its plenary power and based upon a well-documented concern that American Indians were not being accorded the protections of the constitutional limitations which adhere to Federal, State, and local governments. 22/

The disagreement here is therefore a very important one, for it goes to the heart of the power of Congress to regulate the

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21/ Statement of the Navajo Nation Department of Justice, Sept. 11, 1987, from William A. Riordan, Asst. Attorney General, and Eric Dahlstrom, Deputy Attorney General, at p. 5.

22/ Letter of Aug. 8, 1988, from ICRA Subcommittee Chair William I. Allen to Navajo Attorney General Michael P. Upshaw.

affairs of Indian tribes in ensuring that United States citizens are accorded the guaranties of the Indian Civil Rights Act.

III. COMMISSION JURISDICTION

A. Generally

The Commission's investigative authority is derived from 42 U.S.C. section 1975c(a)(1) through (5):

> The Commission shall --
> (1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, sex, age, handicap, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;
>
> (2) study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin or in the administration of justice;
>
> (3) appraise the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin or in the administration of justice;
>
> (4) serve as a national clearinghouse for information in respect to discrimination or denials of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, including but not limited to the fields of voting, education, housing, employment, the use of public facilities, and transportation, or in the administration of justice;

> (5) investigate allegations, made in writing and under oath or affirmation, that citizens of the United States are unlawfully being accorded or denied the right to vote, or to have their votes properly counted, in any election of presidential electors, Members of the United States Senate, or of the House of Representatives, as a result of any pattern or practice of fraud or discrimination in the conduct of such election . . . .

B. ICRA Jurisdiction

As was mentioned above, at their monthly meeting in June 1986, the Commissioners unanimously approved a resolution establishing a Subcommittee to hold hearings on enforcement of the ICRA. That resolution sets forth the jurisdictional bases for the Commission's ICRA investigation, as follows:

> WHEREAS, the Commission has jurisdiction to hold hearings concerning legal developments constituting discrimination or a denial of equal protection under the Constitution because of race, color, religion, sex, age, handicap, or national origin or in the administration of justice particularly concerning American Indians, pursuant to section 5(a)(2) of the Civil Rights Act of 1983, 42 U.S.C.A. Sec. 1975c(a)(2); and
>
> WHEREAS, The Commission has jurisdiction to hold hearings in order to appraise the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin or in the administration of justice pursuant to Section 5(a)(3) of the Civil Rights Act of 1983, 42 U.S.C.A. Sec. 1975c(a)(3); 23/

23/ "Resolution for Hearings," approved at the monthly Commission meeting on June 20, 1986, p. 25, Commission meeting transcript.

The resolution cites both subsection 2, the Commission's "legal developments" jurisdiction, and subsection 3, its "appraisal jurisdiction," as authority for the agency's ICRA inquiry. The questions to be asked in analyzing Commission jurisdiction under each of these subsections are very straightforward, set forth here, first, with respect to the agency's "legal developments" jurisdiction:

> * Is there a legal development?
>
> * If so, is there an issue of discrimination or denial of equal protection of the laws under the Constitution on the basis of race, color, religion, sex, age, handicap, or national origin or in the administration of justice?

Secondly, with respect to "appraisal" jurisdiction:

> *Is there a law or policy of the Federal government at issue?
>
> *If so, is there an issue of discrimination or denial of equal protection of the laws under the Constitution on the basis of race, color, religion, sex, age, handicap, or national origin or in the administration of justice?

IV. LEGAL DEVELOPMENT AND APPRAISAL JURISDICTION

A. The Need for a Legal Development, Federal Law or Policy, or Their Absence

Existing Commission interpretations of a legal development or Federal law or policy date back to 1958. On April 10 of that year, a legal development was described in an Office of General Counsel memorandum from Harris Wofford to Father Theodore Hesburgh:

> Legal developments presumably must be actions of legal authorities, that is, of

agencies authorized to make, interpret, or enforce laws -- actions of federal, state, and local legislatures, executives and courts. 24/

The appraisal of laws and policies, on the other hand, was described in the following terms:

> [There is a need] for positive Federal laws and policies designed to promote the conditions necessary for the equal protection of the laws in addition to laws and policies designed to counteract denials of equal protection.
>
> An appraisal of Federal laws and policies requires consideration of the possible lack of and need for such laws and policies as well as the efficacy of existing ones. 25/

The meaning of legal developments was further discussed by the Commissioners at their monthly meeting of March 20, 1960. There they considered and adopted a document entitled, "The Scope of Authority of the Commission on Civil Rights Under Section 104(a) of the Civil Rights Act of 1957." 26/

24/ Quoted in OGC Memorandum of Aug. 12, 1971, at 4. The Office of General Counsel is charged with the responsibility of making determinations in the first instance regarding agency jurisdiction. The Commissioners, of course, make the ultimate determinations.

25/ Quoted in OGC Memorandum of Aug. 12, 1971, at 7.

26/ Official Meeting Minutes, Monthly Commission Meeting of March 20, 1960. In 1960, section 104(a)(2), which sets forth the agency's legal developments jurisdiction, mandated that the "Commission study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution." Efforts are being made to retrieve the Scope of Authority document from the National Archives.

A reference to a definition of legal developments contained therein is found in an Office of General Counsel memorandum dated March 22, 1966:

> The Scope of Authority statement . . . defined "legal development" as "governmental action or inaction," as "evidenced by statutes, ordinances, regulations, judicial decisions, acts of administrative bodies and of officials acting under color of law," or by discriminatory application of nondiscriminatory statutes, ordinances, or regulations." "Inaction of Government officials having a duty to act" was also held to constitute a "legal development." Finally, private individual or group action may be a legal development, "if it prevents or interferes with action by [a] governmental official or agency in the performance of a duty." 27/

The agency's legal developments and appraisal jurisdiction were again examined in an Office of General Counsel memorandum dated August 12, 1971. In describing a legal development, the Office of General Counsel cited the Wofford memorandum quoted above, stating:

> While Mr. Wofford's memorandum discussed the Commission's "legal developments" jurisdiction in terms of governmental acts which themselves constitute a denial of equal protection, this jurisdiction should also be construed to include the failure of government to safeguard against denials of equal protection.
>
> . . . .
>
> The Commission's "legal developments" jurisdiction, therefore, includes the collection and study of information bearing

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27/ OGC Memorandum of March 22, 1966 at 5, citing "The Scope of Authority of The Commission On Civil Rights under Section 104(a) of the Civil Rights Act of 1957."

> on whether Federal, State, and local governments are living up to their obligation to take the affirmative actions necessary to secure equal protection of the laws for minority persons.

The memorandum describes the agency's appraisal jurisdiction, on the other hand, in the following terms:

> This section directs the Commission to determine the nature and extent of racial, ethnic, and religious discrimination and to evaluate Federal laws and policies for remedying such discrimination.
>
> Any discrimination involving Federal, State, or local government falls within the concept of denial of equal protection and hence comes within the Commission's jurisdiction.
>
> The Commission has always construed its jurisdiction to extend to discrimination by private groups and individuals as well. This is because the phrase "laws and policies of the Federal Government with respect to denials of equal protection" is interpreted to include all remedies which are -- or might be -- provided by the Federal Government to remedy such private discrimination. In light of Supreme Court cases in the mid-60's the Federal Government has broad powers to assure constitutional rights under the fourteenth and fifteenth amendments.
>
> Throughout its existence, the Commission has had as a central concern the enactment and implementation of effective measures for outlawing acts of discrimination -- private as well as public. At the same time, the Commission has recognized that Federal laws and policies designed to remedy discrimination must include much more than prohibitions against discrimination. In addition, Federal laws and policies must grapple with (i) remedying the effects of past discrimination and (ii) remedying "institutionalized discrimination."

A Commission memorandum of February 24, 1977, 28/ further explains with respect to appraisal jurisdiction:

> Taking this position to the next step, it is clear that the absence of a law or policy of the Federal government, where such law or policy would contribute to alleviating denials of equal protection, provides the Commission with jurisdiction to investigate, to report and to recommend to the Congress and the President with respect to the need for such law or policy. 29/

The Office of General Counsel again discussed the agency's definition of legal developments and laws and policies, in a memorandum of February 6, 1981:

> [The Commission's legal developments jurisdiction] directs the Commission to study and collect information on "legal developments," which have been interpreted by the Commission to include decisions and actions by any part of the legal system (judicial, legislative, executive or administrative), including the failure to act where there is an arguable legal or constitutional duty. The existence of a "legal development" is necessary to trigger the Commission's authority under this section.
>
> [The appraisal jurisdiction's] mandate is broader, since appraising the laws and policies of the Federal government requires the Commission to study factual conditions underlying Federal policies. The Commission need not identify a specific legal development upon which to base its work.
>
> Under [the appraisal jurisdiction], the Commission may even study the need for a Federal law or policy where none presently exists, since the government's failure to act where it has the power to act is itself a "policy." 30/

28/ OGC Memorandum of Feb. 24, 1977.

29/ Id. at 1.

30/ OGC Memorandum of Feb. 6, 1981.

To summarize, then, as a threshold matter, an inquiry based upon the Commission's legal developments or appraisal jurisdiction must involve a "legal development" or "laws and policies of the Federal Government." Where there is an arguable duty to act, inaction will satisfy Commission jurisdiction. Moreover, the legal developments under Commission study may consist of governmental action or inaction at whatever level of government, and private action will suffice if governmental action is thereby interfered with.

While it may be obvious, it is worth emphasizing that there is substantial overlap between the agency's "legal developments" jurisdiction and its "appraisal" jurisdiction. Whether the inquiry arises out of either one of these two jurisdictional grants, it is often essential that factual conditions in the field be examined in order for the Commission to accomplish its mandate. Such factfinding -- which takes the form of Commissioner field hearings, staff field investigations, or Commission State Advisory Committee factfinding meetings or community forums -- is essential to the Commission's task of determining the adequacy of enforcement of federal civil rights laws.

As was mentioned, while the first tier in analyzing legal developments or appraisal jurisdiction concerns the existence of a legal development or Federal law or policy, the second tier is to determine the existence of an issue relating to discrimination or a denial of equal protection. Subsection B will discuss this further.

23

B. The Need for a Denial of Equal Protection or Discrimination

1. The Commission's Equal Protection Clause and Congressional Intent

That equal protection is a broad term cannot be denied. Indeed, despite the fact that the Fourteenth Amendment was ratified in 1868, immense controversy regarding its language continues to surround it in both courts and the journals. 31/

Against this backdrop, this subsection will explore Congress' intent in 1957 when it established the Commission with a mandate that it examine denials of equal protection in regard to "legal developments" and Federal "laws and policies." Although the scope of the Commission's original equal protection language was narrowed by amendments in 1964, 1972, and 1978 and thereby limited to denials of equal protection based upon "race, color, religion, sex, age, handicap, or national origin or in the administration of justice," a reading of the observations made by Congress about the breadth of the Commission's jurisdiction makes clear their continued relevance. Following the discussion of Congressional intent, Commission interpretations and practice with respect to the equal protection mandate will be explored. The discussion will then shift to the Commission's jurisdiction over discrimination.

31/ The phrase "equal protection of the laws" appears in the Fourteenth Amendment, which applies to the States rather than the Federal government. The words, "due process," which appear in the Fifth Amendment, have been held to impose some of the same limitations and obligations on the Federal government. See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954).

The Commission was established by the Civil Rights Act of 1957 with the following duties:

> (1) to investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;
>
> (2) to study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and
>
> (3) to appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution. 12/

Expressions of Congress' intent overwhelmingly indicate that the Commission's grant of jurisdiction was extremely broad. Senator Case, for example, noted during the Congressional debate that the Commission's legal developments jurisdiction is "one of the broadest authorities ever given to any commission created by statute." 13/ The Commission's appraisal jurisdiction, he remarked, "is even more significant in its potentiality":

> The section provides that the Commission shall "appraise the laws and policies of the Federal Government with respect to equal

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12/ P.L. 85-315, Part I (Sept. 9, 1957), 71 Stat. 1957; The House Report accompanying the House bill described the Act's purpose as "designed to protect the civil rights of persons within the jurisdiction of the United States."

13/ 103 CONG. REC. 13843 (1957).

> protection of the laws under the Constitution." Appraising the laws -- this means doing something normally reserved for committees of Congress.
>
> . . . .
>
> [T]he fact remains that we here propose to create a noncongressional Commission, not composed of Members of Congress, which shall have the responsibility of appraising the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.
>
> The Commission may second-guess the legislative branch of the Government. It may second-guess the executive branch of the Government. It is to "appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution."
>
> . . . .
>
> With the broad investigative field which is given to it, the Commission certainly can accomplish a great deal in exposing any injustice and any deprivation of equal rights, and in making corrective recommendations.
>
> Therefore I say that if the bill did no more than carry part I, creating the Civil Rights Commission, it would of itself constitute the greatest single forward step for the improvement of the civil rights of the citizens of the country that has been taken in the last 75 years. 34/

Senator Eastland, who opposed establishment of the Commission, argued that its jurisdiction relating to equal protection matters was "as broad as the desires of the Commission." 35/ "Even the Supreme Court itself," he went on to

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34/ Id. (emphasis added).

35/ 103 CONG. REC. 13860 (1957) (emphasis added).

say, "has no idea over any extended period of time what the words, "equal protection of the laws" means." 36/

Senator Talmadge of Georgia offered the following observations:

> MR. PRESIDENT: . . . [T]he authority of the Commission would extend to "study and collect information concerning legal developments constituting denial of equal protection of the laws under the Constitition." That provision is as limitless as the universe itself. 37/

Others attacked the scope of the Commission's jurisdic ion as "almost unlimited," 38/ "too broad or too vaguely defined," 39/ "omnipotent," 40/ and "nationwide in scope and unparalleled in power." 41/ Senator Ellender repeated the

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36/ 103 CONG. REC. 13861 (1957).

37/ 103 CONG. REC. 13725 (1957)(emphasis added).

38/ 103 CONG. REC. 11561 (1957)(remarks of Sen. Russell).

39/ 103 CONG. REC. 13878 (1957)(remarks of Sen. Mundt).

40/ 103 CONG. REC. 8674 (1957)(remarks of Rep. Rogers).

41/ 103 CONG. REC. 13869 (1957)(remarks of Sen. Ellender). A comment by Rep. Whitten also sheds light upon the scope of the Commission's equal protection jurisdiction: "Is it not a matter of fact that the Constitution would not or does not limit the authority of the Congress to set up by law a commission to investigate matters which go far beyond the fields set out by this bill? The purpose might be for the assembling of information for use in determing whether to offer a constitutional amendment. The point I make is that the Constitution limits or is supposed to limit what we may control by statute or cover by statute -- but the Constitution itself does not limit the Congress in regard to investigations by a commission authorized by the Congress, though of course I believe limits should be set by the Congress." 103 CONG. REC. 9023 (1957).

argument cited above by Senator Case, namely, that in establishing the Commission as an Executive Branch agency, Congress was delegating to it powers appropriate to the legislative branch:

> Whose function is it to investigate and obtain facts concerning the need for additional Federal laws, or the modification or repeal of existing Federal laws? Who but Congress can pass laws implementing the 14th and 15th amendments to our Constitution? The answer is plain: It is to be found in the very first grant of power contained in our Federal Constitution -- in the opening words of article I, which read: "All legislative powers herein granted shall be vested in a Congress of the United States." 42/

Other members of Congress expressed concern about the indefinite and evolutionary character of the concept of equal protection. "I am not a lawyer," commented Senator Byrd, "but I know that it is axiomatic in constitutional law that the term 'equal protection under the laws' is not an accurately known matter." 43/ Representative Riley lamented that the scope of the Fourteenth Amendment "is ever being increased by the legislative decisions of the Supreme Court." 44/

42/ 103 CONG. REC. 13869 (1957).

43/ 103 CONG. REC. 11817 (1957).

44/ 103 CONG. REC. 8676 (1957).

In addition, several members of Congress indicated that in their view the Commission would have a role in defining its equal protection jurisdiction. Recall Senator Eastland's declaration cited earlier that "The duties of the Commission relating to 'equal protection of laws' are as broad as the desires of the Commission." 45/ Likewise, Representative Vinson observed:

> What do the words "legal developments constituting a denial of equal protection of the laws under the Constitution" mean?
>
> Why obviously, since there is no definition in the bill, those words will mean whatever the Commission wants them to mean. 46/

An attempt to clarify the meaning of equal protection of the laws in the context of the Civil Rights Act of 1957 was made by Senators Javits and Ervin during debates on Part III of the Act, which pertained to the power of the Attorney General to seek injunctive relief to prevent conspiracies designed to deprive any person of equal protection of the laws. Though the Commission's establishment was provided for in Part I of the Act, the discussion is nonetheless instructive.

Senator Ervin quoted with approval a portion of a definition of equal protection from Corpus Juris Secundum. 47/

45/ 103 CONG. REC. 13860 (1957).

46/ 103 CONG. REC. 8678 (1957)(emphasis added). See also 103 CONG. REC. 11817 (1957)(remarks of Sen. Byrd).

47/ 103 CONG. REC. 12079 (1957).

In response, Senator Javits read into the record the entire C.J.S. section, as follows:

> Equal protection to all is the basic principle on which rests justice under the law. By virtue of a clause in the 14th amendment of the Constitution of the United States expressly forbidding it to do so, a State may not deny to any person within its jurisdiction the equal protection of the laws. This clause is a pledge of equal protection of laws or protection of equal laws; and it means, and is a guaranty, that all persons subjected to State legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed; but it guarantees only the protection enjoyed by other persons or classes in the same place and under like circumstances, in pursuit of their lawful occupations, and it is not a guaranty of equality of operation or application of State legislation on all citizens of a State.
>
> It is intended to secure and safeguard equality of right and of treatment against intentional and arbitrary discrimination, but it operates only on legal rights otherwise created or existing and does not itself create any new legal rights, except the general right to equal protection of the laws. The equality guaranteed and required by it is equality of right and not of enjoyment, and discrimination in the grant of mere favors is not a denial of equal protection. The right is not an abstract right, but is a command which the State must respect. Rights protected include the right to acquire, enjoy, own, and dispose of property. . . . 48/

2. Civil Rights

In addition to discussions employing the equal protection phraseology of the Commission's statute, the Congressional

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48/ 103 CONG. REC. 12085 (1957).

debates included discussions of Commission jurisdiction in terms of "civil rights." 49/ Representative Abbitt viewed the Commission as having "authority to make a full study of all civil rights." 50/ Representative Keating stated that the primary purpose of the Commission was "to determine whether there is a need for further legislation in the field of civil rights." 51/ Representative Celler declared that a purpose of the Commission was "to make an overall study to get the complete picture throughout the Nation as to whether there is or is not discrimination or the corrosion of civil rights . . . ." 52/ Representative Poff indicated his belief that under the language of the bill the Commission would "have no power to investigate a matter which cannot be classified as a civil right within the meaning of the Constitution." 53/ Representative Willis described the purpose of the bill based upon its title as being "to further secure and protect civil rights, not only one kind of right but all civil rights." 54/

49/ Some members of Congress also described the Commission's authority in terms of "constitutional rights." See, e.g., 103 CONG. REC. 8859 (1957)(remarks of Rep. Keating); 103 CONG. REC. 9193 (1957)(remarks of Rep. Powell).

50/ 103 CONG. REC. 8544 (1957).

51/ 103 CONG. REC. 8497 (1957)

52/ 103 CONG. REC. 8493 (1957)

53/ 103 CONG. REC. 8545 (1957).

54/ 103 CONG. REC. 9186 (1957).

The issue of what civil rights are guaranteed by the Civil Rights Act of 1957 prompted Senator Javits, again in a debate arising out of Part III of the bill, to have printed in the Congressional Record a list entitled, "Specific Civil Rights Protected by the Constitution and Laws of the United States." The list is as follows:

Right to vote in Federal elections.

Right of a voter in a Federal election to have his ballot fairly counted.

Right to vote in all elections free from discrimination by State on account of race or color.

Right to inform a Federal officer of a violation of Federal law.

Right to testify in Federal court.

Right to be free from mob violence while in Federal custody.

Right to be secure from unlawful searches and seizures.

Right to peaceably assemble free from unreasonable restraint by State or local officials.

Freedom of religion.

Freedom of speech and of the press.

Right not to be purposefully discriminated against in public employment on account of race or color.

Right not to be denied use or enjoyment of any governmentally operated facilities on account of race or color.

Right not to be segregated under compulsion of State authority on account of race or color.

Right not to be denied due process of law or equal protection of the law in other regards.

Right to be free to perform a duty imposed by the Federal constitution.

examining the meaning of equal protection of the laws and in identifying the civil rights intended to be protected by the Civil Rights Act of 1957, the record of the debate reveals a concise list of civil rights which includes many constitutional rights, and which includes all of the rights protected by the Indian Civil Rights Act of 1968. Established by the Civil Rights Act of 1957, the Commission's mandate clearly extends to all of these rights.

3. The Meaning of the Discrimination Clause

In 1978, Congress amended the Commission's jurisdictional grant to specify that the agency had jurisdiction over discrimination based upon age or handicap. Neither the House Report nor the House Conference Report indicate whether addition of the word "discrimination" to the agency's statute affected the agency's jurisdiction in contexts unrelated to age or handicap.

An Office of General Counsel memorandum of February 6, 1981, asserts that the addition of discrimination was necessitated because age and handicap status do not receive heightened scrutiny under the Equal Protection Clause. Thus, the argument would go, a State could discriminate on the basis of age or handicap status without violating the equal protection clause. To take this argument further, the view appears to be that since the Commission apparently would lack

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FOOTNOTE CONTINUED FROM PREVIOUS PAGE

While it must be granted that the Commission's jurisdiction is broad, Congress may, of course, limit its jurisdiction. It has previously done so: By express jurisdictional restrictions, the Commission may no longer gather information in the area of abortion, or with respect to the membership practices and internal operations of fraternities, private clubs, or religious organizations.

jurisdiction to involve itself in the discrimination absent an arguable denial of equal protection, Congress expanded the Commission's jurisdiction to include a broader standard.

The memorandum takes this argument a step further, asserting that the word "discrimination" pertains only to age and handicap discrimination and not to race, color, sex, national origin or religion, or, for that matter, administration of justice. While the Commission could thus examine age and handicap discrimination that did not constitute a denial of equal protection, it could not examine racial, sex, national origin, religious discrimination, or administration of justice unless it did.

The memorandum is incorrect. All that is necessary from the standpoint of satisfying the Commission's jurisdiction is an arguable existence of differential treatment based on race, color, religion, sex, age, handicap, national origin, or membership in a distinct class with respect to the administration of justice. Further, the view expressed in the memorandum is inconsistent with the view of eight members of the Senate Judiciary Committee, who expressed their understanding of the additional language as follows:

> The phrase "discrimination or" is included in the duties of the Commission as a technical amendment to conform the act with the congressional intent that the Commission's mandate include the power to investigate, study, and report on all forms of race, color, religion, sex, age, handicap, or national origin discrimination occurring in the United States. The committee feels that the Commission has successfully worked within the mandate granted by Congress and fulfilled the mission intended by the Congress under

> the Civil Rights Act of 1957 and the amendments thereto. This amendment . . . is simply to set within the body of the law the express intent of the committee and the Congress that the Commission continue to exercise its duties as it has in the past. 57/

4. Commission Interpretations and Practice

Commission practice with respect to its "legal developments" and "appraisal" mandates reflects a broad view of those mandates. 58/ One may also look to Commission memoranda and statements for interpretations of the agency's discrimination or equal protection mandate, many of which have

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57/ 124 CONG. REC. 19181 (1978).

58/ See, e.g., Title VI: One Year After, USCCR Report (1965)(evaluates operation of Title VI as it relates to health and welfare services in selected communities); Children in Need, USCCR Report (1966)(studies aid to needy children); A Time to Listen . . . A Time to Act, USCCR Report (1967)(summarizes testimony given by ghetto dwellers about what slum residents think about the conditions under which they live); Mexican Americans and the Administration of Justice in the Southwest, USCCR Report (1970)(presents information on alleged discriminatory practices by law enforcement agencies and judiciary bodies against Mexican Americans); Homeownership for Lower-Income Families: A Report on the Racial and Ethnic Impact of the Section 235 Program, USCCR Report (1971); The Woodlawn Organization, USCCR Report (1970)(describes the formation of the independent Model Cities Program); Window Dressing on the Set, USCCR Report (1979)(analyzes the role of women and minorities in network news and dramatic programming); The Equal Rights Amendment: Guaranteeing Equal Rights for Women Under the Constitution, USCCR Report (1981)(updates a 1978 Commission assessment of the ERA); Characters in Textbooks: A Review of the Literature, USCCR Report (1980)(reviews portrayals of minorities and women in elementary and secondary textbooks); Making Civil Rights Sense Out of Revenue Sharing Dollars, USCCR Report (1975); and Constitutional Aspects of the Right to Limit Childbearing, USCCR Report (1975)(preface describes how proposed constitutional amendments "designed to nullify the right to limit childbearing, as defined by the Supreme Court, would undermine the First, Ninth, and Fourteenth Amendments to the Constitution.")

been cited previously for other propositions. 59/

59/ A dialogue which took place between Senator Sam Ervin and Commission Vice Chairman Robert Storey in Senate hearings on the Commission's establishment in 1959 is also instructive:

> SENATOR ERVIN. Dean, I want to say that I, for one, appreciate the emphasis you place on the fact that this question of the equal protection of the laws is such a broad field.
>
> As a matter of fact -- I should say as a matter of law -- a question under the equal protection of the laws clause could possibly arise at every point and in every area in which a State or a county or a municipality or other official of a subdivision of a State undertakes to act in an official capacity with respect to any person; is that not true?
>
> MR. STORY. That is true; yes, sir, it is an endless process.
>
> SENATOR ERVIN. Yes, sir. In other words, it is something that is coextensive with the entire field in which a State or political subdivision of a State is empowered either to legislate or to apply legislation. . . .
>
> MR. STOREY. We have, I might add, many people who write in about alleged infringement of personal rights as opposed to official rights, and all of those things we have to construe from time to time the best we can in the fast moving situation that we have.
>
> SENATOR ERVIN. As I pointed out this morning, volume 16A of Corpus Juris Secundum shows that a mere discussion in a summary fashion of questions that could arise under the equal protection of the laws clause of the Fourteenth Amendment starts on page 295 and runs through page 531, making 238 pages necessary merely to discuss in general fashion these questions.
>
> It gives some indication of the extent of this subject. . . .

FOOTNOTE CONTINUED ON NEXT PAGE

The 1960 Commission Statement on the scope of its authority mentioned earlier contained an appendix which indicates that the Commission did not see itself as limited by current judicial interpretations of the equal protection clause, a very important point:

> [T]he Commission's jurisdiction extends beyond the scope of specific court decisions condemning specific violations of the equal protection clause. This, too, is obvious, for several reasons. One is that no lawyer would say that a rule, law or constitutional provision was inapplicable to a particular situation simply because no case had yet been brought or decided in which it was held applicable. 60/

The Commission memorandum of February 24, 1977, discussed above, maintains, as did Senators Case and Ellender in the 1957 debates, that the Commission's scope of jurisdiction over equal protection matters parallels that of Congress' authority to legislate in that area:

FOOTNOTE CONTINUED FROM PREVIOUS PAGE

> MR. STOREY. Another illustration, for example, is one where we held a housing meeting in New York. One reason we went there was because they had many laws and regulations both on the State and municipal level in that particular field.
>
> You have the question of, and the argument about, what about private housing and all of that, whether or not there is an alleged denial of equal protection, and that is why we have decided to go to some other cities where you do not have the laws, you do not have the regulations, to see what the situation is there and, of course, all those facts affect not only housing but other related matters too. Testimony of Robert Storey, 1959 Senate Hearings, at 246.

60/ Quoted in OGC Memorandum of March 22, 1966, at 5.

> the jurisdiction of the Commission is co-terminus with that of the Congress with respect to denials of equal protection of the laws under the Constitution because of race, religion, sex, or national origin, or in the administration of justice.
>
> To the broadest extent that Congress can constitutionally enact legislation affecting Federal law and policy in this area, the Commission can investigate, report and recommend legislation to it. 61/

It should be pointed out, furthermore, that the Commission's equal protection mandate is not limited to examining Federal statutes enacted pursuant to the Fourteenth Amendment. 62/ For example, the Commission has jurisdiction to appraise Federal laws and policies and examine legal developments relating to Title II of the Civil Rights Act of 1964, yet Congress enacted this Title under the Commerce Clause rather than the Fourteenth Amendment. Moreover, the Commission has conducted numerous activities with respect to Title VII of the 1964 Civil Rights Act which prohibits employment discrimination despite a belief, recently challenged by the late

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61/ OGC Memorandum of Feb. 24, 1977, at 1.

62/ "The laws and policies of the Federal Government which the Commission 'shall appraise,' are not limited to the laws and policies enacted, or enforced, solely for the purpose of implementing the fourteenth amendment. . . ." OGC Memorandum of Feb. 24, 1977.

Chairman Clarence M. Pendleton, Jr., that Congress enacted Title VII pursuant to the Commerce Clause. 63/

V. THE ADMINISTRATION OF JUSTICE

Although the Commission was established in 1957, it was not until 1964 that Congress amended the Commission's jurisdictional grant to specify that it examine "legal developments" or appraise "laws and policies" concerning denials of equal protection because of race, color, religion, or national origin or in the administration of justice. In doing so, Congress brought the agency's legal developments and appraisal jurisdiction into conformity with the language governing the Commission's voting rights jurisdiction.

63/ See Statement of Clarence M. Pendleton, Jr., Toward an Understanding of Johnson, USCCR Publication, Oct. 1987, at 7 (arguing that Title VII was enacted pursuant to the 14th Amendment rather than the Commerce Clause). Alternatively, the Commission could recommend amendments to the immigration and naturalization laws to provide better treatment of undocumented aliens. If legislation were enacted, it would be pursuant to Article I, Section 8, Clause 4, of the Constitution, which authorizes Congress "to establish a uniform rule of Naturalization. . . ."

In a memorandum of Feb. 24, 1977, the Office of General Counsel advised the Staff Director that it was within the jurisdiction of the Commission to investigate and make recommendations with respect to the nondiscrimination provisions of the Arms Export Control Act of 1976, which was not enacted by Congress pursuant to the Fourteenth Amendment.

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1. The Reach of The Administration of Justice

In the only recorded reference to the administration of justice amendment, Senator Hubert H. Humphrey, floor manager for the 1964 Civil Rights Act, offered the following statement:

> This amendment makes it clear that the functions of the Commission are not to be expanded beyond matters constituting "denials of" the equal protection of the laws "because of race, color, religion, or national origin or in the administration of justice." This change does not alter to any significant extent the function of the Commission since it has in the past largely confined itself to this phase of denials of equal protection. The change is designed merely to conform the statutory powers of the Commission to the areas in which it has in the past operated and in which it contemplates operations. Basically, as the amendment indicated, these are denials of equal protection because of race, color, religion or national origin, and denials of equal protection in the administration of justice, whether or not related to race, color, religion, or national origin. 64/

That the Commission's examination of discrimination in the administration of justice need not be related to race, color, religion, sex, age, handicap, or national origin was confirmed by the Commissioners in a statement unanimously adopted at their August 15, 1977, monthly meeting. The statement reads, in relevant part:

> The United States Commission on Civil Rights has jurisdiction to collect, study, and publish information concerning the denial (by Federal, State, or local governments) of equal protection of the laws (1) because of race, color, religion, sex, or national origin or (2) in the administration of justice. . . .

64/ 110 CONG. REC. 12714 (1964)(emphasis added).

> Our jurisdiction over equal protection in the administration of justice is considerably broader. We believe that, under this jurisdictional category, we are able to investigate the disparate treatment of any class of persons by law enforcement, corrections, probation and parole, and the courts, both civil and criminal. . . . 65/

It has been the longstanding view of the Office of General Counsel that the Commission may examine denials of equal protection in the administration of justice in relation to any class of persons. 66/

2. The Meaning of The Administration of Justice

The legislative history of the amendment whereby administrative of justice jurisdiction was added to the Commission's statute does not provide a definition of the term. Recall, however, that the Commission statement of August 15 cited above interpreted the term to apply to the "disparate treatment of any class of persons by law enforcement, corrections, probation and parole, and the courts, both civil and criminal. . . ."

65/ Emphasis added.

66/ OGC Memorandum of March, 1971 at 2; OGC Memorandum of Aug. 12, 1971 at 1; OGC Memorandum of May 21, 1972; OGC Memorandum of July 2, 1976; OGC Memorandum of May 16, 1979; OGC Memorandum of Feb. 6, 1981; OGC Memorandum of June 30, 1981.

A Commission memorandum of July 2, 1976, also described administration of justice matters:

> The Commission's administration of justice jurisdiction refers to issues of equal protection in judicial (both civil and criminal), law enforcement, and corrections activities, and includes all stages of the judicial and enforcement process (including, e.g., bail, arrest, conduct of trial, imprisonment, probation, etc.) 67/

The meaning of the term is also made clear by its application. Examples of Commission Reports which examined administration of justice matters include: Who is Guarding the Guardians? A Report on Police Practices (1981); Indian Tribes: A Continuing Quest for Survival (1981); American Indian Rights Handbook (1980); Battered Women: Issues of Public Policy (a consultation, Jan. 1978); Cairo, Illinois: A Symbol of Racial Polarization (1973); The Southwest Indian Report (1973); Who Will Wear the Badge? A Study of Minority Recruitment Efforts in the Protective Services (1971); Mexican Americans and the Administration of Justice in the Southwest (1970); Law Enforcement: A Report on Equal Protection in the South (1965); Civil Rights: Interim Report of the U.S. Commission on Civil Rights (1963); Justice: 1961 Commission on Civil Rights Statutory Report, Vol. V. (1961).

67/ OGC Memorandum of July 2, 1976 at 15, quoting from OGC Memorandum of March 31, 1971.

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Examples of Commission State Advisory Committee (SAC) reports which have examined administration of justice matters include: Police-Community Relations in Montgomery Alabama (1986); Implementing the Massachusetts Civil Rights Act (June 1983); Implementation of Federal Civil Rights Laws in Iowa (1983); Federal Civil Rights Enforcement in Middle-America (1983); Doing Time: A Study of Prison Conditions at U.S. Penitentiary, Lewisburg, Pennsylvania (1983); Police Relations in Small Colorado Communities (1983); External Review of Complaints of Police Misconduct in Portland, Oregon (1982); The Administration of Justice in Pensacola and Escambia County (April 1981); Race Relations in Toma County, Iowa (1981); Police-Community Relations in the City of Wichita and Sedgwick County, Kansas (1980); The Baltimore Police Complaint Evaluation Procedure (1980); Battered Women and the New Hampshire Justice System (1980); Police Community Relations in San Jose, California (1980); Georgia Prisons (1976); Blacks in the Arkansas Delta (1974); Alabama Prisons (1974); Adult Corrections in Arizona (1974); Colorado Prison Study (1974); The Delaware Prison System (1974); Inmate Rights and the Kansas State Prison System (1974); Inmate Rights and Institutional Response: The Nebraska State Prison System (1974); Indiana Civil Rights Issues in Montana, North Dakota and South Dakota (1974); The Struggle for Justice and Redress in Northern New Mexico (1974); Warehouse Human Beings (1974); Judicial Selection in Virginia: The Absence of Black Judges (1974); Indian Civil Rights Issues in Oklahoma (1974); Police Isolation and Community Needs (1972) (Wisconsin); Racial Conditions in Indiana Penal Institutions

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(1971); Police-Community Relations in East Los Angeles, California (1970); Civil Rights in Texas (1970); Police and the Minority Community in Wilmington, Delaware (1970); Employment, Administration of Justice, and Health Services in Memphis, Shelby County, Tennessee (1967); Report on the Administration of Justice in Starr County, Texas (1967); Report of an Open Meeting on Police-Community Relations in Peoria, Illinois (1966); Cleveland's Unfinished Business in Its Inner City (1966); Report on Police-Community Relations in Minneapolis and St. Paul (1965); Police-Minority Relations in Los Angeles and the San Francisco Bay Area (1964); Report on Panama City (1964); and Administration of Justice in Mississippi (1963).

A survey of just a few of these for the scope of the inquiry undertaken by the Commission is helpful. The American Indian Civil Rights Handbook, first published by the Commission in 1972 and reprinted in 1980, explained to American Indians their freedoms of religion, speech, press, assembly, and petition, even to the point of discussing use of peyote under the ICRA's free exercise clause. The rights of the accused and due process of law were discussed at length, through all stages of the adminstration of justice, from arrest through trial. In addition, equal protection of the laws was discussed, including the right to vote in the tribal context and what to do if that right were denied.

In Who is Guarding the Guardians: A Report on Police Practices, 68/ the Commission focused on recruitment and

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68/ USCCR Report (Oct. 1981).

training for police work, internal regulation of police departments, external controls, and remedies for police misconduct.

In Law Enforcement: A Report on Equal Protection in the South, 69/ the Commission examined denials of constitutional rights, the failure to investigate incidents of racial violence, failure to protect or prosecute, official interference with the exercise of Federal rights, and remedies.

And in Indian Tribes: A Continuing Quest for Survival, 70/ the Commission discussed the Federal role in law enforcement on reservations, the tribal police (oftentimes employees of the Bureau of Indian Affairs), the FBI, U.S. Attorneys, Department of the Interior, and Department of Justice. Attention was paid to investigations, prosecutions, and declinations of prosecutions.

To summarize, then, in examining denials of equal protection or discrimination in the administration of justice, whether in terms of "legal developments" or Federal "laws and policies," it is evident from the legislative history, Commission interpretation, and Commission practice that the agency has broad jurisdiction to study any class of persons. It is clear as well from longstanding Commission interpretations of the administration of justice language and

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69/ USCCR Report (Nov. 1965).

70/ USCCR Report (June 1981).

from historical practice that the Commission may examine the many activities involved in civil or criminal litigation, from beginning to end, at whatever level of government.

VI. LEGAL DEVELOPMENTS AND APPRAISAL JURISDICTION IN THE CONTEXT OF THE INDIAN CIVIL RIGHTS ACT INQUIRY

A. The Existence of Legal Developments and Federal Laws and Policies

Based upon the foregoing, the analysis of whether the Commission has jurisdiction to monitor enforcement of the Indian Civil Rights Act begins with the threshold question of whether in doing so the agency is studying and collecting information concerning a "legal development" or appraising a Federal "law or policy." The answer is yes, in many ways: first, with respect to the Indian Civil Rights Act itself; secondly, with respect to the Martinez decision; and, thirdly, with respect to the myriad governmental and private actions or inaction which the Subcommittee is examining as part of its assessment.

The test is easily met with regard to the first. For in being principally concerned with enforcement of the Indian Civil Rights Act, a Federal civil rights statute, the Subcommittee is both examining a legal development and appraising a Federal law. To argue either of these would belabor the obvious.

Moreover, the question under examination by the Subcommittee concerns the impact of the Supreme Court decision in Santa Clara Pueblo v. Martinez. The Martinez decision is, of course, a legal development.

Reference was also made to a third category, composed of myriad governmental and private actions or inaction, some federal and some tribal. With respect to the federal level, the Subcommittee has devoted significant attention to the role of the Department of the Interior in monitoring ICRA compliance and enforcing its provisions. In fact, the Department's inaction in enforcing the ICRA is not only clearly a legal development triggering the agency's legal developments jurisdiction, it is a Federal policy which triggers the agency's appraisal jurisdiction.

The Bureau of Indian Affairs' policy of ICRA nonenforcement, furthermore, stems from another policy which the Subcommittee has examined, namely, the Federal government's announced policy of Indian Tribal Self-Determination. The Subcommittee is appraising this policy also, but only as the interpretation of that policy relates to ICRA enforcement and the question of whether Indians on reservations are being fully accorded the rights enjoyed by other Americans.

With respect to Bureau of Indian Affairs ICRA enforcement, based upon language of the ICRA itself, and upon Supreme Court dicta in the Martinez decision, the Subcommittee expected that the Bureau would be performing a role. Title III of the ICRA expressly directs the Interior Department to develop a model code to govern the administration of justice by Courts of Indian Offenses. 71/ Moreover, the Supreme Court in Martinez, in holding that federal courts could not adjudicate ICRA claims

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71/ 25 U.S.C.A. Sec. 1311 (West 1983).

other than writs, pointed to two forums in which ICRA enforcement could take place, viz., tribal forums, and the Office of the Secretary of the Interior, who is empowered through language in approximately half of the tribal constitutions enacted pursuant to the Indian Reorganization Act to approve changes to those constitutions. 72/

Thus, to ascertain how the Bureau was performing ICRA enforcement responsibilities, the Subcommittee requested information in a nine page letter dated December 9, 1987, in additional requests by telephone, and in an entire hearing devoted to the subject. 73/ The Subcommittee learned that the Bureau has not developed the model code for the administration of justice as directed by Congress, that it was not exercising ICRA enforcement through the Secretary's power to approve changes to Indian constitutions, and, in fact, that it had no mechanism by which to ascertain to what extent, if any, the ICRA is being observed and enforced. 74/

With respect to the myriad tribal governmental and private action or inaction mentioned previously as part of the third category of legal developments, these cover the spectrum of

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72/ "Many tribal constitutions adopted pursuant to 25 U.S.C. Sec. 476, though not that of the Santa Clara Pueblo, include provisions requiring that tribal ordinances not be given effect until the Department of Interior gives its approval. In these instances, persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior." 436 U.S. at 66 n.22 (citation omitted).

73/ See supra note 14 concerning the Washington, D.C. hearing.

74/ Washington, D.C. Hearing, supra note 14.

actions relating to each of the rights ensured by the Indian Civil Rights Act. The Subcommittee has examined, to name a few examples, alleged violations of the ICRA provisions governing illegal searches and seizures, the right to counsel, and the privilege against testifying against oneself. It also heard testimony from tribal members that they had been barred from running for tribal office, and about poor jail conditions, employment terminations without notice or cause, the shutdown of a tribal newspaper in alleged violation of the right of free press, the removal of tribal judges for rendering decisions against tribal councils, eviction from a pueblo without due process, and denials of the right to bail, the right to a speedy trial, the right to be apprised of the charges against oneself, and election irregularities. 75/ Significant amounts of hearing testimony were devoted also to legal developments surrounding the issue of whether tribes may properly claim sovereign immunity against ICRA claims. 76/

B. The Existence of Discrimination or Denials of Equal Protection

The second issue in determining whether the Commission has jurisdiction in terms of its ICRA inquiry to "study and collect information concerning legal developments" or "appraise the laws and policies of the Federal Government" is whether the legal developments, or laws or policies, constitute 'discrimination or a denial of equal protection because of race, color, religion,

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75/ See supra note 16.

76/ See supra note 17.

sex, age, handicap, or national origin or in the administration of justice." The response to this must take place in terms of the Federal "laws and policies" and "legal developments" previously identified.

1. The Indian Civil Rights Act

We may begin with the Indian Civil Rights Act -- which is both a legal development and a Federal law -- and ask whether it is concerned with discrimination or a denial of equal protection based upon the grounds enumerated in the Commission's jurisdictional language, including the administration of justice. For this, one must look to the language of the statute and to expressions of Congressional intent.

Although the statute does not contain a statement of purpose, there can be no question that it is intended to provide basic protections to reservation residents against excesses of tribal self-government, particularly with respect to the administration of justice. 77/

77/ It may be argued that the rights specified therein are constitutional rather than civil rights, and that the Commission lacks jurisdiction to inquire about the enforcement of constitutional rights. In response, it must be pointed out that the rights established by the ICRA are civil rights inasmuch as they are statutory rather than constitutional; that constitutional rights are in any event the most basic of civil rights; and that Commission practice has been to monitor enforcement of both constitutional rights and statutory civil rights. Reference should also be made to the earlier discussion of the Congressional debate surrounding enactment of the Civil Rights Act of 1957, and the insertion into the Record of the list of civil rights intended to be protected by the 1957 Act, which Act also established the Commission on Civil Rights. The list of civil rights placed into the Record contains all of the rights in the ICRA.

The Indian Civil Rights Act is a consolidation and modification of five bills and one Senate joint resolution, introduced on May 23, 1967, by Senator Sam Ervin of North Carolina. 78/ On the occasion of their introduction, Senator Ervin noted that the purpose of the legislation was "to safeguard the constitutional rights of our Nation's Indian citizens." 79/ In addition, he stated that

> In introducing these proposals, I wish to emphasize that these bills should not be considered as the final solution to the many serious constitutional problems confronting the American Indian. A system of law and order for the Indian tribes of America which is in keeping with the rights and privileges other Americans enjoy, will take years to develop. The substance of these bills, however, is an exceedingly important and necessary part of this goal. 80/

He went on to say:

> This bill is a pioneer bill in the sense that it represents the first effort on the part of Members of Congress to confer upon the American Indians the fundamental constitutonal rights which belong by right to all Americans.
>
> When the Subcommittee on Constitutional Rights began its study of this problem, most of its members were astounded to learn that under decisions of the courts, reservations Indians do not possess the same constitutional rights which are conferred upon all other Americans by the Bill of Rights and the Constitution.
>
> The pending bill undertakes to confer such rights upon reservation Indians, who have languished long in a legal no-man's-land.
>
> . . . .

78/ S. 1843, S. 1844, S. 1845, S. 1846, S. 1847, S.J. Res. 87, 90th Cong., 1st Sess., 113 CONG. REC. 13473-77 (1967).

79/ Id.

80/ Id.

> As I stated, this is a monumental bill, because it undertakes for the first time to confer upon the reservation Indian the same basic rights which all of us as Americans enjoy under the bill of rights. It is designed to make the Indian a first-class citizen. 81/

Senator Hruska of Nebraska added:

> As the hearings developed and as the evidence and testimony were taken, I believe all of us who were students of the law were jarred and shocked by the conditions as far as constitutional rights for members of the Indian tribes were concerned. There was found to be unchecked and unlimited authority over many facets of Indian rights. There was a failure to conform to many of the elemental and traditional constitutional safeguards. The Constitution simply was not applicable.
>
> For instance, there was no right of appeal at all, no right to a jury, no right to be represented by counsel -- all of those are simple rights which we have just taken for granted. None of them was found to apply to the Indians. 82/

81/ 113 CONG. REC. 35472 (1967).

82/ 113 CONG. REC. 35473 (1967). It is instructive as well to refer to conclusions of the Subcommittee cited by Senator Ervin in his floor statement. Those bearing upon the ICRA's purpose are as follows:

> 1. The historical development of a unique relationship between the Indian communities and the United States has resulted in a situation in which there exists, unfortunately, both the potentiality and the actuality of deprivation of individual rights by tribal governments.
>
> 2. Though evidence of the denial of substantive and political rights has been brought to the subcommittee's attention, it is apparent that an Indian citizen's rights are most seriously jeopardized by the tribal government's administration of justice. These denials occur, it is also apparent, not from malice or ill will, or from a desire to do injustice, but from the tribal judges' inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system. 113 CONG. REC. 13473 (1967)(emphasis added).

These statements and, of course, the language of the Indian Civil Rights Act itself, make clear that the purpose of the ICRA is to provide certain basic rights to persons residing on reservations or who deal with tribal governments. As Senator Ervin said when describing the various bills later consolidated into the Indian Bill of Rights, these bills were "the essence of civil rights measures." 83/

In additional views expressed in the Report of the Senate Committee on the Judiciary, he also said:

> There is no doubt that the American Indian is the most neglected minority group in the history of this Nation. Even though the Indians are the first Americans, the national policy relating to them has been shamefully different from that relating to other minorities. 84/

Senator Ervin's sentiment that the American Indian is "the most neglected minority group in the history of this Nation," and that "the national policy relating to them has been shamefully different from that relating to other minorities" poignantly expresses the Subcommittee's concern in holding its series of hearings on enforcement of the Indian Civil Rights Act.

The fact is, although Senator Ervin spoke these words twenty years ago, they are no less relevant today. The Commission's interest has been in protecting the rights of individual Americans. The question very simply is whether a class of American citizens, i.e., American Indians residing on

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83/ S. REP. NO. 721, 90th Cong., 1st Sess., reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 1837, 1864.

84/ S. REP. NO. 721, 90th Cong., 1st Sess., reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 1837, 1863.

reservations, is suffering the deprivation of the most basic and essential civil rights in contrast to American citizens not living on reservations. 85/

Whether the Commission's examination of legal developments or Federal laws and policies in the ICRA context is rooted in discrimination or differential treatment based upon race, color, national origin, or in the administration of justice, its examination is clearly based upon a concern that the civil rights protections provided to these persons be real and not made of paper. 86/

Dr. William B. Allen, Chairman of the Commission and of the Subcommittee on Enforcement of the Indian Civil Rights Act, succinctly expressed the Commission's jurisdiction during the last Subcommittee hearing when he stated:

> I would like to comment in general for the benefit of the audience assembled who have listened to this colloquy that the Commission is confident about its authority and jurisdiction. But perhaps one needs to be reminded that that jurisdiction does not extend over any corporate body per se, whether the Navajo or any State or the Federal Government. It is primarily concerned with Americans wherever they be found.
>
> Many people have spent time calculating the percentages of blood that this or that

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85/ The American Indian was granted American citizenship by act of Congress in 1924 (8 U.S.C.A. Sec 1401(b) (West 1970 & Supp. 1988)).

86/ Trudell Guerue, former Chief Judge of the Rosebud Tribal Court, testified with respect to his concerns that the blanket assertion of sovereign immunity renders the ICRA meaningless. He stated that: "The Indian Civil Rights Act--this may not be nice to say, but you get more use out of a roll of toilet paper. That is nothing. It means nothing. It is an intellectual dishonesty, and it's just not right." Rapid City Hearing, supra note 14, at 125-126 (testimony of Trudell Guerue).

> Indian might have in a given nation. We don't make those calculations at this Commission, and we don't think there are any calculations of American bloodedness.
>
> Rather, every American in any degree whatever is a full-blooded American. That is where our writ runs, and that is where we conduct our inquiries. 87/

2. Santa Clara Pueblo v. Martinez

As mentioned above, the second legal development under examination by the Subcommittee is the Supreme Court decision in Martinez. It should be emphasized that Martinez was an ICRA equal protection case. Thus, the issue of whether the Supreme Court's resolution of the forum issue in Martinez constitutes a "legal development" regarding "denial[s] of equal protection of the laws under the Constitution . . . in the administration of justice" 88/ is easy to resolve. The ICRA is a "law under the Constitution" 89/ which forbids an "Indian tribe in exercising powers of self government" from "deny[ing] to any person within its jurisdiction the equal protection of its laws." 90/ Certainly, Julia Martinez thought that she had been denied equal protection under the ICRA. She and her daughter had brought suit for declaratory and injunctive relief under the ICRA against enforcement of a tribal ordinance which denied membership in the tribe to children of female members who married outside of the tribe. Rather than decide the ICRA equal

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87/ Flagstaff II Hearing, supra note 14, at 95-96.

88/ 42 U.S.C.S. Sec. 1975c(a)(2) (Law Co-op. 1986).

89/ Id.

90/ 25 U.S.C. Sec. 1302(8) (West 1983 & Supp. 1988).

protection issue one way or the other, the Court held that ICRA claims, apart from writs of habeas corpus, must be raised in either tribal forums or in Department of the Interior proceedings. The Court's decision that the ICRA is a rule of decision for tribal forums and Department of the Interior proceedings reflects its holding that the ICRA is a valid "law under the Constitution" which binds Indian tribes.

3. The Third Level -- Legal Developments

Finally, there is the question of whether Federal or tribal governmental actions examined by the Commission, some of which were described above, concern legal developments constituting discrimination or a denial of equal protection on the basis of race, color, national origin, or the administration of justice.

The answer flows largely from the reasoning stated above. In particular, with respect to the Subcommittee's efforts to monitor the Department of Interior's role in enforcing the ICRA, the existence of the predicate of discrimination or denial of equal protection stems from the purpose of the ICRA and the legitimate questions about whether it is being observed and enforced.

William J. Howard

WILLIAM J. HOWARD
General Counsel

APPENDIX D

August, 1988

DRAFT -- EYES ONLY -- R. DESTRO, S. PRADO, B. HOWARD

DRAFT REPORT AND RECOMMENDATIONS FOR

THE SUBCOMMITTEE ON THE ENFORCEMENT OF
THE INDIAN CIVIL RIGHTS ACT OF 1968

for

THE UNITED STATES COMMISSION ON CIVIL RIGHTS

by

William Barclay Allen

I. THE OBLIGATION OF THE FEDERAL GOVERNMENT

1. The status of people of American Indian descent has been ambiguous within the Republic. The federal government has attempted to conduct its relations with the Indians in a manner that implies both:

(a) a confederated relationship towards Indian tribal government, preserving the obligations of the federal government to guaranitee both the civil rights of individual Indians and the republican governance of their tribes; and

(b) a relationship between independent states, mutually exclusive in their claims of sovereignty, implying no such federal obligations towards individual Indians or their polity.

The decision, whether the relationship between the federal and tribal governments is pre-eminently the first or the second has previously been made and ratified by the long history of legislative, executive and judicial conduct between these two levels of government. In particular, the *Indian Civil Rights Act of 1968* legislates for "any tribe, band or other group of Indians [both] subject to the jurisdiction of the United States *and* recognized as possessing the powers of self-government" (25 USC 1301). This legislation, while implying final federal authority, contains an untenable contradiction, morally and logically, which has entailed disastrous consequences for individual Indians -- that is, for American citizens.

Had Congress aimed to guarantee the integrity of tribes as such -- and not the rghts of Indians -- it erred in naturalizing Indians as citizens of the United States. Nevertheless, error or no, the power to naturalize citizens is the one power Congress' exercise of which does not permit a repeal, since the act itself awards powers and rights to the individual beyond the reach of Congress. Congress has the power neither to rescind this act of naturalization nor to ignore the consequences of it.

2. The conduct of the government of the United States asserts an ultimate sovereignty over tribal governments *and* individuals, even given that Congress (through Court interpretation) has limited the appellate jurisdiction of the federal courts to the issues of *habeas corpus* and tribal jurisdiction. Insofar as particular tribal sovereignty antedated the *Bill of Rights* and *Fourteenth Amendment*, it has been thought that no simple extension of these guarantees to individual Indians is possible (*Talton v. Mayes*

163 U.S. 376, 1896). But, at the same time, Congress reserves the "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess", and any enactments by Congress itself must be directed by the *Bill of Rights* and *Fourteenth Amendment*, and by the intention, *mutatis mutandis*, to recognize such guarantees as the supererogatory claim of all legitimately within the limits of its authority and responsibility.

The conduct of the government of the United States has been based on the assertion of its ultimate obligation to individual Indians, including the granting of franchise, the levying of taxes and the obligations of national service.

The conduct of tribal authorities generally has asserted an acceptance of the ultimate authority of the United States, given the extent to which tribal coursts freely argue the scope of their jurisdiction in the relevant state superior or federal district courts and routinely submit their own writs for enforcement by these courts.

The conduct of particular Indians generally asserts an acceptance of the ultimate authority of the United States, given the extent to which they have sought relief in federal courts from the occasionally arbitrary administration of justice in their own tribal courts and councils.

3. The aspiration, on the part of the Congress of the United States, to permit to Indian tribes such limited sovereignty as is necessary for the preservation of tribal custom and community, in no way releases the government of the United States from its obligation to protect and preserve the natural rights of all its citizens, including those within Indian territory and descending from Indian forebearers. Indeed, Congress has a stronger obligation to acknowledge the rights of full-blooded Americans (including Indians) than it has to acknowledge the claims of Indian blood *per se*, since the only authority it has to act with regards to the latter, is on behalf of the former.

Thus, when the law speaks of the Indian tribes as "distinct, independent communities, retaining their original natural rights" (*Worchester v. Georgia*, 31 U.S. 515, 1832), it must be understood that these natural rights adhere to real Indians severally and not to contingent tribal governments particularly, since governments necessarily derive "their just powers from the consent of the governed." A real analogy, useful for understanding the plight of individual Indians under the *Constitution*, is seen in the War of American Union. Ultimately, the republican guarantee clause* was far more important there than either the problem of slavery or the putative legitimacy of secession. For the fact that, even when one concedes the presence in a state or tribe of a majority disposition toward separation or independence, the resulting, and so-called, minority possesses claims on the Union that cannot be spurned. So long as that "minority" individual or persons constitutes part of our republican and constitutional majority in the Union, the republican guarantee clause obligates the national government to defend them against anti-republican initiatives. This was the true

* It is fashionable in the scholarship to point to this clause (*Art.IV, Sec.4*) as the sole uninterpreted and unenforced portion of the *Constitution*. That, however, is an error which derives from the affectation that the *Constitution* is enforced and/or interpreted only to the extent to which it has been expounded by the Court. One would quickly cure himself of that affectation were he sensitively to revisit the grounds and events of the The War of American Union and the process of Reconstruction. There, we discover not only that this crisis was not handled in an extra-constitutional manner, but that the resources for interpreting and enforcing the *Constitution* exceed by far the narrow ambit of litigation.

problem of secession, as it was as well the ground on which Lincoln stood. So, too, is it the claim every Indian citizen of the United States has today against Congress, the Court, and the President.

4, Tribes do not have rights apart from those adhering to each and every member, no more than do municipalities, states or the national government itself, existing as they do in the free loyalty of each member to a shared way of life. Thus, given a parallel and direct allegiance between the government of the United States and individual Indians, this government is obliged to ask at least two questions concerning the relationship between these tribal members and their tribal governments:

(a) The enumeration of particular rights within the *Indian Civil Rights Act of 1968* cannot be construed to deny or disparage rights adhering to Indians as American citizens (among which is this right of local self-government), given this act to be that of a Congress itself constitutionally so restrained. So, given the extent to which any tribal judiciary provides for a right of appeal, "the procedures used...must comport with the demands of due process" (*Evitts v. Lucey*, 469 U.S. 393), demands perhaps poorly met if the final forum for appeal is the tribal council. The constitutionality of the *ICRA* may be questioned, initially, in the context of Congress' duty to ensure due process to particular Indians as citizens of the United States. Does recourse solely to writs of *habeas corpus* constitute a sufficient protection for the civil rights of Indians, in relation to their own tribal government?

(b) Tribal government is derivative of and subordinate to those natural rights which arise from the common humanity of individual Indians, and thus tribal government itself remains bound to act only with consent, however that consent receives its substantive expression in the establishment of public offices and honors, public works and holidays, in the sum of local tribal legislation. Congress acknowledges its responsibility in limiting even tribal government by the consent of the governed, in "imposing certain restrictions upon tribal government similar but not identical to those contained in the *Bill of Rights* and *Fourteenth Amendment*" (*Santa Clara Pueblo v. Martinez*). To the extent to which their own tribal governments become reckless of the consent of tribal members, they then violate those natural rights acknowledged in the *Constitution*.

Thus, the constitutionality of the *ICRA* may be questioned, ultimately, in the context of the *Bill of Rights* and *Fourteenth Amendment* themselves, for these provisions are but particular instantiations of the *Declaration of Independence*.

The natural right to self-government finds its expression in the *Bill of Rights*, including its acknowledgement of the retention of unenumerated rights by the people (which acknowledgement is omitted from the *ICRA*). If the rights acknowledged in the *Constitution* were in fact less inclusive than acknowledged in the *ICRA*, it might be thought that the self-government of Americans generally has been inadequately protected. But the reverse is the case. Tribal government has been granted greater license and made less accountable in its rule. Thus, the question must be asked: does the enumeration of rights in the *ICRA* adequately express and protect those natural rights upon which the claims of Indian self-government themselves must be founded?

If, after examination of the actual conditions of the administration of justice within Indian jurisdiction, these questions cannot be answered in the affirmative -- if, in other words, it is demonstrated that Americans of Indian descent neither enjoy the rights of their citizenship in free, local self-government and the administration of justice, nor, as Indians, have any subsequent recourse in the securing of their rights as

Americans -- then the government of the United States is duty bound to provide them with some avenue of redress.

II. THE PROXIMATE PROBLEM

1. The federal government, through the Bureau of Indian Affairs, the federally-funded BIA police, and the armed might of the Union as a whole, acts as the final guarantor of existing tribal governments, as they are currently constituted. Thus, the federal government denies to particular Indians such possible relief, as might be obtained through their exercising their natural right "to alter or abolish" their tribal government through joint rebellion. At the same time, there are complaints against particular Indian tribes which, if substantiated, would lead to the conclusion that particular tribal governments have become "destructive of these ends," the preservation of such customs and communities as are made possible by free self-government. It is the obligation of the federal government to preserve the opportunity for free self-government for all Americans. Yet, in the case of Americans of Indian descent, there is no effective mechnaism, by means of which the federal judiciary could confirm or deny such allegations against tribal governments, any such mechanism having been deliberately eschewed. Thus, the government of the United States in fact ensures the sovereignty of subordinate governments of which it cannot ensure the legality.

It must be appreciated that no blanket condemnation of any tribal government is or need be imputed here. What is at issue here is the question of due process and the consequent protection of individual liberties. Certainly, particular tribes are more-or-less well governed, in accordance with the moral characters of their tribal concillors and judges. But, what is apparent, *universally*, is that such government does depend, in fact, upon the accidents of character. Should ever the best-governed tribe fall under the control of persons of rapacious intent, at that point, the common members of the tribe are without recourse.

The assertion of the right of Indians to self-government, for the sake of the protection of their customs and communities, should not establish the right of some few Indians to tyranny over their fellows, federally-enforced.

2. The *Indian Civil Rights Act of 1968* contained several substantial deviations from the *Bill of Rights*, none of which can be taken to imply any restrictions upon the liberties of Americans of Indian descent. There is no enumeration of the right to keep and bear arms, nor any prohibition agains the billetting of militia, yet one must assume these unenumerated rights to obtain (especially since they are specifically recognized for all Americans in the *Constitution*). There is some manifest restraint in "unduly" restricting the scope of tribal government. For example, tribal authorities are enjoined to respect the right to the free exercise of religion, without being subject to any concomitant injunction against its establishment. Such restraint is taken to permit the preservation of "such traditional values" as are still "significant in tribal life" (Justice Marshall, in *Martinez*). Concurrently, Congress did continue to restrict the operations of the tribal judiciary, imposing limits upon the severity of sanctions which could be imposed by tribal courts.

3. It seems the general consensus of the witnesses at the hearings of the Subcommittee on the Enforcement of the *Indian Civil Rights Act of 1968*,** that this act bore the force of law in the tribal administration of justice, until the Supreme Court handed down its decision in the case, *Santa Clara Pueblo v. Martinez* (436 US 49, 1978). Until that point, it seems to have been assumed that some sort of federal appellate jurisdiction obtained, enforcing the observance of the *ICRA*. (RC 18, 173). But, after the Martinez decision, it became clear, *both* that the application of the provisions of the *ICRA* are mandatory for the Indian judiciary, *and* that there is no mechanism for enforcing this application within the tribal courts or in the relationship between tribal judiciary and executive. The Congress was understood to have passed a law, one provision of which was its denial of any "necessary and appropriate remedies" (Justice White, dissenting).

> "The key to all this stuff that we are talking about is accountability... As long as tribal governments say, 'we are immune; you can't touch us', you're going to have these abuses..." (Guerue, RC 125).

III. COMMON COMPLAINTS

Many persons made serious allegations against various tribal courts and councils, and tribal executives or legislators themselves bear the ultimate authority for the conduct of tribal courts, while they are themselves not responsible to those courts or any higher court for their own conduct in office. This report neither confirms nor denies any particular such allegations; rather, we highlight questions of an institutional inadequacy to identify means by which such allegations can be routinely examined, confirmed, or denied. None can deny the seriousness of the allegations. Accordingly, it is important to detail the sorts of abuses which folk fear. This results precisely from the fact that tribal executives are freed of any accountability, given current interpretations of the meaning of "sovereign immunity." It will be instructive to repeat *verbatim* the summary presented as Exhibit 12 of the Washington hearing:

Allegations of Abuse: Rapid City Testimony

1. Police brutality (no recourse).
2. Banishment from the reservation.
3. Violation of privilege against self-incrimination.
4. Arrest and incarceration without charges being filed (Judge Gerue estimates 300+ in 5 months).
5. Dismissal of tribal judges and prosecutors by tribal council in retaliation (Pine Ridge prosecutor fired 8 times).
6. Overruling court decision by tribal council or by council member (court decrees are "essentially a sham" – Remerowski).
7. Lack of standards and training for police.
8. Nepotism; unfair hiring practices.
9. Undue influence by tribal council members on police department.

** Refereaces to hearings will be cited in this text, in the form of appropriate initials, together with an indication of the page number in the published transcript or panel: RC for the Rapid City hearing (July 31, August 1 and 21, 1986); F for the Flagstaff hearing, (August 13-14, 1987); W for the Washington hearing (January 28, 1988); P for the Portland hearing (March 30, 1988). In addition, S designates the hearing of the Senate Select Committee on Indian Affairs (January 22, 1988).

10. Removal of police officers for political reasons.
11. Election irregularities ("very, very serious problems" -- Krista Clark).
12. Lack of independence of tribal court.
13. 40% of Legal Aid cases were ICRA violations --Remerowski.
14. "There are widespread violations of people's rights to due process of law under ICRA." -- Krista Clark.
15. Unnecessary ex parte orders.
16. Barring members form holding tribal office.
17. Having one judge reverse the decision of companion judge.
18. Lower courts ignoring the decision of appellate court ("I don't think that precedent means anything." -- Krista Clark).
19. Tribal law asserting sovereign immunity prevents ICRA suits.

To repeat, it is not the purpose of this report to examine any particular set of allegations. What is at issue is the absence of any institutional recourse for the examination of such allegations. Though the examples cited above were drawn from selected hearings, it is yet the case that examples of such charges can be found throughout the country. The Northwest tribes seem freest from such abuses; but the relative absence of tyrannical power in the governance of those tribes seems due to their being relatively poorer, smaller and thus presenting fewer opportunities for the rapacious. Should they ever experience an increase in wealth and opportunities, they have every reason to expect the same sorts of federally funded and enforced autocracy, as has occurred elsewhere in Indian country.

Such allegations against tribal government are common throughout Indian country. A further survey of alleged tribal abuses can be seen in the summary (W, Exhibit 11) of those complaints filed in federal court, against tribal governments, which actions were forestalled by the *Martinez* decision. It may be concluded from these allegations that there is little to prevent tribal councils from the issuance of Bills of Attainder and the similar abuses of the rule of law.

> "Sovereignty is good if you don't have to live under it, it sounds ideal, but when you have a government that is not fair with the people and breaks their own constitution and the laws are not applied equally, citizens like us are in a bind" (F, Chu Chu).

IV. "ALTERNATE DISPUTE RESOLUTION" AND THE ISSUE OF TIME

1. The claim often was made in testimony that Indian peoples have had an administration of justice going back centuries before the arrival of the white man, an administration of justice founded more upon the notion of the development of a consensus than the decision between rival claimants. But, however true and laudable this may be, such a claim is irrelevant to the issue at hand. To the extent to which traditional fora of adjudication can continue to be effective in Indian country, they will in fact reduce the case load upon the formal, already overburdened judicial system; all for the good. However, it cannot be allowed that such court procedures as are "commonly employed in Anglo-Saxon society" (*Howlett v. Salish*) remain merely an arbitrary tradition, given that the process of codification itself has intended a vehicle of justice less arbitrary, precisely in its enforcing a *rule of law*. Nor, in particular, can it be allowed that "Anglo-Saxon" jurisprudence is suspect, as if it necessarily compromises traditional practices of adjudication or legislation.

Those adversarial procedures loosely dismissed as "Anglo-Saxon" were codified in coping with those cases in which informal adjudication has broken down, in which the failure to arrive at some mutually agreeable compromise must result either in humble submission to some decision, the tyrannical imposition of that decision, or attempted tyrannicide on the part of the dissatisfied party. Now, it may have been the case, traditionally, that tribal arbitration was often accepted in good spirits, simply because the only recourse was to homicide and susequent exile. Thus, it may seem that the very presence of an adversarial judicial system is meant simply to extend and enforce alternatives to bloodshed.

We cannot fail to recognize the most distinctive aspect of Anglo-Saxon jurisprudence: it demands a plaintiff. The judge can not ordinarily initiate a complaint. The citizen must. When, therefore, citizens betake themselves to court, it is less because the adversarial process drives them there, than because other means of resolution have failed. The incidence of litigation, therefore, is a useful index of the adequacy of alternative methods of resolution, in the eyes of the persons subject to them.

Thus, when federal courts acknowledge the need to weigh "the individual right to fair treatment" against "the magnitude of tribal interests in employing those procedures" (*Stands Over Bull v. BIA*), it must be understood, not that a tribal court must be granted broad scope in depriving a plaintiff of procedural safeguards, but that the plaintiff's informed consent may allow broad (though necessarily informed) waiving of such safeguards, in the interests of arriving at some pre-judicial compromise.

2. The claim was often made that the tribal courts are in their infancy, "in pampers" (P, Maulson), in a period of learning in which trial and error is inevitable and necessary (W 263). There was considerable evidence that particular tribal courts and regional judges associations have made grerat strides over the past decade, for which they are, of course, to be commended. But, however true and laudable this may be, such a claim does not settle the issue at hand. Though there may have been great strides in the competence of the members of the tribal courts, it remains the case that the operations of the courts are entirely at the whim of tribal councils, in principle if not always in fact (W 261; P, Rousseau).

Tribal courts have, in fact, no practical authority over the tribal police forces (RC 124). So long as the tribal council has an *unchallengeable* authority to hire and fire the armed constabulary of the reserve (which they do, whether the tribal police are formally BIA employees or not), and those officers themselves have no judicial recourse against the executive, that constabulary will accept its directions from the tribal judiciary only to the extent sanctioned by the tribal executive.

Sovereign immunity, as interpreted in Martinez, becomes the vehicle of tyrannical power, in that there is no access to adjudication of the enrollment, employment, and electoral practices of existing tribal governments. The difficulty, faced by even the best of courts, is not merely its deliberative separation from the council, but, more practically, its separate powers of enforcement. Therefore, even a tribal judiciary secure in its own position would have no power to protect other Indians from the arbitrary exercise of power. Because it is unable to monitor executive actions, the tribal judiciary is unable to prevent the collapse of the legislative and executive functions into each other. The consequence is government by decree.

3. In the context of the *Martinez* decision, it must be appreciated that recourse to writs of *habeas corpus* will be an insufficient defense of individual civil rights, so long as the enforcement of the judgements of the tribal courts themselves depend upon the whim of a politicized constabulary; and the constabulary itself is politicized merely by the non-accountability of the the tribal executive in its employment practices, or by the tribal executive's control of the "moccasin telegraph" to Washington, controlling the BIA police (RC 124). The violation of fair employment pracitces by the tribal executive are not the most violent of abuses of the civil rights of Indians by their own executive, but they make possible those most violent abuses. As Justice White observes, "since several of the specified rights are most frequently invoked in non-custodial situations, the natural assumption is that some remedy other than *habeas corpus* must be contemplated" (dissent to *Martinez*).

There can be no simple requirement of the independence of the Indian judiciary which is not, at the same time and necessarily, a qualification of "sovereign immunity" as currently understood. For judicial independence would qualify, not tribal integrity, but executive license. Such a limitation of executive power would not, however, violate the ultimate purpose of limited tribal sovereignty, the preservation of custom and community, because "rule by decree" itself is rather the greatest degradation of customary law.

Again, it must be appreciated that the difficulties in enforcing the *ICRA* need not be taken to imply any gross moral turpitude on the part of most or even many individual Indians nor tribal executives. So, for example, given 144 tribal courts, there have been some 50 civil rights complaints to the Justice Department in the decade since *Martinez*, involving no more than 28 of those courts (W, Myers). It may be thought that many violations go unreported, precisely because it is now understood that there is little or no redress to be had through the Justice Department. Regardless, and even supposing that the real incidence of violations is many times less than reported, still it must be realized that there is an institutional inadequacy in the administration of justice for Americans of Indian descent, not because of any necessary failings of the Indian courts themselves, but indeed because of the extent to which those courts are isolated from the support and sustinance of the greater American judiciary, and thus are abandoned to an unequal dependency upon tribal executives.

The "existence of a statutory right implies the existence of all necessary and appropriate remedies." Yet, there are basically three systemic sources of difficulty, routinely recognized, in guaranteeing adequate protection for the statutory rights of individual Indians, as laid out in the *ICRA*, in their dealings with tribal government:

(a) claims of sovereign immunity
(b) lack of separation of powers
(c) lack of funds

VI. SOVEREIGN IMMUNITY

1. We must distinguish between two distinct causes and two distinct circumstances in which sovereign immunity becomes of dominant concern, even for the majority, non-tyrannical tribal governments:

(a) First, monetary liability could expose the already over-stretched tribal treasuries of poorer tribes to fatal predation. Thus, the poorer tribes rightfully fear the

simple cost of the administration of justice, and would avoid Federal oversight for this reason.

(b) The second claim for the avoidance of Federal oversight is simply that "traditional values of dispute resolution and strict constitutional law concepts are not always compatible. The results are that traditional values of the tribe are being lost" (Tulalip response to Pendleton/Hodel questionaire, #18). However, it is unclear the extent to which, first, *eventual* appellate oversight must have so corrosive an effect, and, second, whether such effect as it may have must not be considered an acceptable price for recognizing the right of particular Indians to further adjudication.

2. The first difficulty may be resolved with but moderate practical encroachment upon sovereign immunity as it is currently understood. It should be possible to require the waiving of soveriegn immunity, so as to provide for declaratory and injunctive relief, NOT including the award of monetary damages (P, Fry). At the same time, it should be possible to seek costs and monetary damages from tribal officials, in cases where they have exceeded their constitutional authority. The *Martinez* decision, itself, would clearly support such a distinction, as the action against an officer of the Pueblo is forestalled, not by any claim of sovereign immunity, but by "Congress' failure to provide remedies other than *habeas corpus*" (at 49). This point cannot be overemphasized. Redress through the prosecution of the persons of the tribal executives does not constitute a violation of sovereign immunity; yet such an avenue, if practicable, will depend upon the as yet unrealized independence of the tribal judiciary.

3. In considering the second cause for the avoidance of federal oversight, we cannot avoid reviewing directly the contention of Justice Marshall, that "resolution in a foreign forum of intratribal disputes of a more 'public' character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority." Beyond the peculiarity of describing the government of the United States as "foreign" in its dealings with Indian-Americans, the Court's opinion constitutes an hypothesis of fact, and must be measured as such.

The Court's opinion ignores the salient fact that a "tribal government's ability to maintain authority" is already the dubious achievement of the federal government. By its providing formal (if not substantive) legitimacy, money, an armed constabulary, secure borders, and the protection of its own criminal justice system, the federal government has alone "settled", not to say "imposed", at least the power, if not the moral authority, of tribal governments. The "authority" of tribal governments, as understood by the courts, may exist in the case of poorer tribes, guided, as it were, by a sort of familial government. But these tribes themselves are not threatened by federal oversight, lacking sources of contention. Many richer and larger tribes, however, have already established oligarchies, compacts of the powerful, federally protected and parasitic upon their fellow tribal members. The Court's romanticism here is demonstrated by its speaking of the authority of tribal "government", while seeing no need to distinguish between the tribal executive and judicary. This failure betrays a belief in the continuing force of the ancient and mythic restraints upon tribal leaders, arising from earlier cosmologies. But traditional authority, as it may once have been, is at best dimly remembered and no substitute for judicial review.

No amount of neglect, by the Federal judiciary, will bring back the buffalo and the trackless forest; and even if it could, it may be wondered whether most Indians would not prefer the opportunities afforded by the *Constitution*, if only they could gain its protections. In any event, the federal government is obliged to provide them.

DRAFT – EYES ONLY – R. DESTRO, S. PRADO, B. HOWARD

VII. THE SEPARATION OF POWERS***

[FEDERAL LIBAILITY
NEED FOR JUDICIAL REGULARITY IN PROMOTING DEVELOPMENT
PROMISE OF CRIMINAL JURISDICTION]

VIII. THE ADEQUACY OF FUNDING

[problem not lack of funds per se: the administration of justice accounts for one percent of the BIA budget.
adequate funding through case load
solution to both separtion of powers and funding in removing the maintenance of tribal courts from BIA and placing under justice dept]

IX. PROXIMATE SOLUTIONS

1. The immediate, short-term problem is to provide tribal members with some recourse beyond the vagaries of their particular tribal courts. The least intrusive change, beginning, would be to establish a BOARD OF INDIAN JUDGES, under the Civil Rights Division of the Department of Justice, for the sake of recommending the precise jurisdiction and organization of INDIAN REGIONAL APPELLATE COURTS, founded upon the existing regional judges associations, organized according to the existing sympathies and common customs of the various tribes within a region, and subordinated, for purposes of further appeal, to the existing circuit courts of the federal judiciary.

This board must itself recommend to Congress such legislation as would be necessary to give the consequent appellate jurisdiction over existing tribal courts and the necessary administrative support through the Department of Justice.

2. Failing the passage of such legislation and the establishment of such courts, by some fixed date, this board must recommend the precise means by which existing tribal courts may be brought under the appellate jurisdiction of existing federal courts; likewise those tribes without an established judiciary. And this board must itself recommend to Congress the repeal of the *ICRA* either *in toto* or of its Section 1302, and the passage of such legislation as would provide some determinate measure of *de novo* review by federal courts in civil rights actions, otherwise assimilated to the general protections afforded all Americans.

3. Concurrent with its contributions to the achievement of either manner of appellate jurisdiction, this board must also recommend some workable and standard manner of ensuring the free election of judges and the obedience of the tribal police to the tribal judiciary, free of undue interferenc of the tribal executive, failing the observance of which the persons of the tribal executive would stand in jeopardy of criminal or civil litigation. And this board must itself recommend to Congress such legislation as would make such a separation of powers mandatory for those tribes claiming legal jurisdiction.

*** The following two sections as outlined may perhaps have been sufficiently treated in the foregoing sections. They remain here only tentatively and probably aimed for elision.

Such mandated separation of powers must not be understood to prejudice the operations of traditional, pre-judicial modes of conflict resolution, neither in those tribes with an established judiciary nor in those without.

4. The progress of the Indian courts, over the last decade, gives ample evidence of the talent available, within the Indian judiciary, for the reform of the relationship between the Indian judiciary, the Indian executive and the federal government. Existing tribal judges associations can provide such jurists as the Honorable Carey Vicenti of the New Mexico Tribal Judges, the Honorable Lorraine Rousseau of the Northern Plains Tribal Judges, the Honorable Sheila McCord of the Southwest Tribal Judges, the Honorable Edith Chenois of the Northwest Tribal Judges, the Honorable Thomas Maulson of the Great Lakes Tribal Judges, the Honorable Don Sollars of the Montana/Wyoming Tribal Judges, the Honorable Donald Dupuis of the National Tribal Court Judges Association, and Jane Smith of the National American Indian Court Clerks Association, or these associations can suggest others of comparable talent and good will.

X. ULTIMATE SOLUTIONS

1. Because the authority of the federal government itself supposes the consent of the people to this government, a complete solution of the problems of guaranteeing the rights of American citizenship to Americans of Indian descent will require a resolution of the ambiguities in the relationship between individual Indians, their tribal government and the government of the United States. No such resolution could encompass the continued existence of the Bureau of Indian Affairs as an agency of the Department of the Interior, though it could continue as a desk at the Department of State. The ambiguity of the relationship between Indians and the government of the United States is, after all, whether they individually are to be considered fully citizens of the United States or as subjects of a foreign government. The government of the United States has already granted its citizenship to Indians individually; the issue is their consenting to accept this citizenship.

2. In such case as where there has been no expressed acceptance of the offer of American citizenship (as is reputed of the Iroquois), and where continued territorial and administrative integrity obtain, the government of the United States must accord full recognition to their independence on grounds mutually acceptable. In such circumstances, Congress must surrender its unjustified assumption of plenary power over the fate of tribal members and the conduct of tribal governments. What will be necessary is the negotiation of a final Treaty of Peace between the independent tribes and the Union, of protocols for the exchange of felons, trade agreements and other such instruments of diplomatic intercourse.

Given the prior grant of citizenship even to those Indians not clearly accepting it, the government of the United States will be obliged to conduct a careful plebiscite among the members of such tribes for which there exists no prior treaty.

3. In such cases (as in the case of the Navajo) in which there has been already a widespread acceptance of American citizenship, but where Indians constitute soundly formed political bodies, possessing the territorial integrity and resouces for the conduct of government, and where there is sufficient divergence of interest between themselves and that state of the Union in which they are contained, they may petition the federal

government for independent status as states, commonwealths, or territories of the United States.

The boundaries of such new polities would require negotiation and agreement with those states within which the Indian territory is already contained; yet, given the difficulties already commonplace in the relationships between existing states and reservations, such agreement can be confidently predicted.

4. In such cases (as in the cases of many Northwest tribes) in which there is neither repudiation of American citizenship, nor the tribal resources nor collective desire to establish a self-sufficient state, commonwealth, or territory of the Union, it may be best that particular tribes adopt the status of a municipality in the state in which they reside. In the case of poorer tribes, any loss in special rights or treaty status must be more than balanced by the benefits which must accrue to the members of the tribe, from becoming fully eligible for the benefits available to residents of their states.

Many Indians may fear the effect of dissolution upon their accustommed way of life, consequent upon the surrender of treaty status; but a revered way of life need not include an attachment to poverty, and cannot include a dependence upon governmental subsidy. There is little need to contemplate the loss of tribal holdings or traditions, as the common possessions of the tribe can be redefined under the provisions of the condominium laws of the particular states, these holdings being managed in accordance with fair provisions. Particular hunting or fishing rights can be redefined as any contract in an extractive industry. Each tribe, continuing to be the manager of its resources, would then be able nevertheless to attract such investment from the state at large, as would improve the patrimony of its children, admitting none that would disrupt the peace of the community.

5. The preservation of customs and community depends, above all, upon the preservation of the children in a community. It is an admission of defeat, on the part of Indian communities, when they find themselves binding children to the tribe, against the will of their parents, by means of the provisions of an *Indian Child Welfare Act*. What employing this act implies is that Indian tribes cannot maintain the allegiance of their children or of the parents of their children, short of employing the coercive force of the federal government. It implies that Indian communities cannot provide to Indian children a life commensurate to their status as free American citizens. Indian children can be delayed in abandoning their tribal heritage only until they reach the age of majority. Yet, certainly the example of the Amish demonstrates that coercive power is unnecessary for the preservation of a particular way of life, within the borders of the Union and its constituent states.

The preservation of Indian children, within Indian communities, must depend, ultimately, upon the free will of their parents and of the children themselves. In order to preserve Indian customs and communities, it is necessary that the reponsible tribal authorities allow the opportunities within the community to hold the allegiance of their people. To surrender the protected status of tribes may seem to risk the survival of Indian customs and communities, but the true risk to the survival of Indian customs comes from the absence of opportunities within Indian communities. It is necessary to surrender the protected status of Indian tribes, if in fact Indian tribes are to become true managers of their common resources. Only thus will their common holdings attract that sort of development which will allow them to build a truly free life in common.

The intention of any reform of the relationship between the federal government and the tribes of Indian Americans must be to extend fully to them those rights

commonplace among Americans of other ethnic extractions. There is no need for a half-way house between tribal membership and American citizenship, because there is no essential opposition between the two. Enjoying fully the advantages of citizenship, Indian Americans are free to build communities, developing their common holdings as they jointly see fit.

APPENDIX E

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

SUMMARY OF EVENTS AT

WHITE RIVER APACHE NATION

on February 7, 1989

by

William B. Allen, Chairman

The context which produced the following account may be briefly told. The subcommittee's investigation of the enforcement of the Indian Civil Rights Act led tangentially to a concern last spring with the Indian Child Welfare Act. That concern focussed almost exclusively upon a case at the Navajo Nation. Along the way we retained the services of a consultant, Dr. Barry Goodfield, to prepare background material for segments of our hearings concerned with the ICWA. In his work Dr. Goodfield produced evidence of problems other than those we had focussed on, and particularly the Apache Nation case of Lalita Johnson-Altaha. We never pursued the Apache Nation case beyond a preliminary report, nor do we think it necessary to do so in a formal manner. Nevertheless I have received subsequent notices of, and expressions of concern with, that case since that time. Moreover, although Dr. Goodfield's contract with us expired in August, 1988, I was aware that he had maintained an involvement and presence in that case. I could not discern to what extent his continued involvement either implicated or was predicated upon his Commission relationship. I next learned that he planned a foray onto the reservation for indefinite purposes but entirely focussed on the Altaha case. Accordingly, my independent concern to tie up the loose ends by means of personal inspection (so as not to raise jurisdiction questions needlessly) combined with my desire to safeguard the Commission from possible misapprehension. I therefore resolved to make the visit myself, and so informed staff.

* * * * * * * * * * * * *

9:10 a.m.

I arrived at Phoenix Airport. Dr. Goodfield met my plane. We walked to the airport entrance, where Martin Phillips and two reporters for NBC awaited in a van, and where Goodfield's assistants (one, his son) awaited in a car he had retained. On the way he informed me that he had a car and that I need not rent one. I accepted to ride with him.

Once under way we reviewed prospects for the day. The anticipated schedule projected an ETA at Cedar Creek around 1:30 p.m., at which time I would first seek a brief interview with the minor child at school and afterward contact the mother if possible (I had been warned that she probably would not talk). Goodfield described his interests and concerns as deriving from his contacts with the foster parents. He carried photographs, a note, and perhaps other ephemera from them. I explained that I simply wanted to close the circle, relative to our pending report, and to learn whether the minor had ever had occasion to speak to her own case in court -- to express her own desires in the case. All I had theretofore were the representations of Goodfield and third parties, often seemingly based on speculation. Goodfield also informed me that he had learned that two federal marshalls would likely be on the reservation at the time we expected to be there, and he had asked them to meet us in order to explain circumstances on the reservation.

While travelling toward the reservation our party lost its way, and therefore considerable time. As a result, instead of arriving while school was in session to request a courtesy interview of school officials (as planned), we arrived just as school was letting out, in fact only in time to have the middle school principal point to the departing bus in which he expected the minor child to be travelling. He also indicated that the bus would pick up additional riders at the nearby high school and that we might catch up to it. I decided to attempt a rendez-vous in order to invite the minor child to speak with us briefly.

1:30 - 2:00 p.m.

Prior to arriving at the reservation we met the marshalls at an appointed rendez-vous. After hearing their descriptions, and being solicitous to safeguard the Commission despite the informality of this visit and my entire dependence on voluntary cooperation, I asked if they had time to accompany us for what I expected to be thirty minutes at most. They agreed, and undertook to introduce me to school officials on the reservation.

3:15 - 3:30 p.m.

When we approached the school bus at the high school parking lot, an unidentified minor came up to me and asked, "Are you looking for Lita?" She proceeded to say that Lita was on the bus. I then invited Dr. Goodfield, who carried personal effects for the minor child, to inquire whether she might speak to us. He leaned into the door way of the bus, called for her by name, and asked if she would speak to us for a moment. She responded to her name, agreed to speak, arose from the rear of the bus and exited. When she

alighted on the sidewalk, the brief interview commenced then and there (rather than in a school office as I had projected).

I learned rather quickly that Lalita felt restrained against her will on the reservation, preferred to dwell with her foster parents, and had never had an opportunity to express that preference before a competent government entity. From her own lips, many of the previous reports that I had regarded as speculative were validated, and with a peculiar and affecting emphasis as she declared, "I am an outcast here."

At that point I was prepared to make an effort to seek her mother and would have expected her to regain her bus seat. The bus was then on the verge of leaving without her. Her interview with Dr. Goodfield, however, became particularly intense and impossible to break off. I had already offered to carry her home in the marshalls' car (would she miss the bus). Instead, as a result of prospects entertained in her exchange with Dr. Goodfield, she walked away from the school and the bus, he boarded his own car and prepared to leave, and she entered the car with him.

While they sat there in the traffic I consulted with the marshalls, making known that I wished to assure her safe delivery at home. After that, I walked to Dr. Goodfield's car and made known my expectations. I then joined the marshalls and proceeded, following the Goodfield car, in the direction of Lalita's home. Along the route Dr. Goodfield stopped on the side of the road, and we behind him. He walked backwards to our vehicle and informed me that he was, indeed, taking Lalita to her home. He invited me to join them to hear more of her story. At that point I descended from the marshalls' vehicle, joined Goodfield's, and continued toward Lalita's home. Along the way Mrs. Thurza Altaha, Lalita's natural mother, passed us in a pick-up. It was Lalita who identified her. She remained just before us until reaching the turn-off to her home. There, without direction, she executed the required left turn, leaving the roadway and leaving our route unimpeded. Dr. Goodfield immediately turned in after her. She then stopped just at the start of the intersecting roadway, and we stopped behind her, just short of the crossing highway. The marshall and others stopped on the shoulder of the crossing highway.

3:50 p.m.

We descended our vehicles and approached Mrs. Altaha who remained at first seated in her truck. I identified myself and offered identification. She afforded me a brief space to say that I had come to hear from each of them, if they wished to tell me, what the situation was, and to inquire how court appearances were being handled and whether

Lalita was informed. I emphasized that not only Lalita but also that she, Mrs. Altaha, had rights and my sole concern was that they were all respected. Mrs. Altaha brushed aside my queries and directed her attention to Lalita, who approached in company with Dr. Goodfield immediately behind me. The ensuing exchanges were tense and not informative. She wished to leave with her daughter -- whom she instructed to get into the truck. Dr. Goodfield detained the child a moment or two longer in private interview and then rejoined me in his own vehicle.

4:10 p. m.

At that point all vehicles parted, Mrs. Altaha toward her home with her daughter and we, in the return toward Phoenix. The events had been, to my knowledge, entirely recorded on video tape by the NBC News crew that had accompanied us. I thanked the marshalls, who put us back in the road leading from the reservation.

APPENDIX F

SUMMARY OF STATEMENTS CONCERNING
WHITE RIVER APACHE INCIDENT

KEY:
S- Summary of Events by William B. Allen, undated
R- Chairman Allen's Response to allegations of Commissioner Destro, March 17, 1989.
H- Testimony of Chairman Allen before the House Committee on Appropriations (subcommittee), March 22, 1989. (numbers in brackets refer to lines in hearing transcript)
T- Remarks of Chairman Allen at Native American Press Association, Tulsa, OK, March 2, 1989.
N- Newspaper accounts (newspaper and date in brackets)

Commission's relation to Dr. Barry Goodfield:

S: "Along the way [of subcommittee's investigation of enforcement of ICRA] we retained the services of a consultant, Dr. Barry Goodfield, to prepare background material for segments of our hearings concerned with the ICWA. In his work Dr. Goodfield produced evidence of problems other than those we had focused on, and particularly the Apache Nation case of Lalita Johnson-Altaha....Moreover, although Dr. Goodfield's contract with us expired in August, 1988, I was aware that he had maintained an involvement and presence in that case. I could not discern to what extent his continued involvement either implicated or was predicated upon his Commission relationship."

R: "Dr. Goodfield planned a "foray" onto the reservation. My concern with his intentions and their implications independently persuaded me to travel there at the same time so as to monitor his representations."

H: (1227) "Mr. KOLBE: ...[A]s I understand it from the initial paragraph of your statement, Dr. Goodfield was no longer under contract to the Civil Rights Commission; is that correct?
Mr. ALLEN: That's absolutely correct, yes.
Mr. KOLBE: He was not even in any formal or consulting capacity at the time you went to Phoenix.
Mr. ALLEN: That's correct.
....
(1285) Mr. KOLBE: He was going in an independent capacity hired not as a consultant but as a doctor representing the family; is that correct?
Mr. ALLEN: In an independent capacity, not hired to represent the family as I knew. It is possible he may have been, but I did not know that. He was certainly going in an independent capacity.
Mr. KOLBE: As far as you know, he was totally in an independent capacity?
Mr. ALLEN: And I might add to this, by the way, that, as I have said in my written statement, that I may have judged it not

worth my trip just to ask the question had he not been going. But since he was going, it became for me then-- the combination became compelling."

T: "...I did not travel with an NBC News crew. It is too long a story to go into here, but in fact the psychologist was going in there with the news crew, quite independently of me. My going there was to avert what I perceived as certain dangers inherent in what they were about to do. I'm glad I was there for that very reason."

N: (Arizona Republic, 2/10/89) "Allen said he was invited to go to the reservation by Barry Goodfield, a San Francisco psychologist who was accompanying a NBC-TV news crew to Whiteriver. Goodfield prepared a report on the girl's case for the commission (sic) last summer."

Presence of U.S. Marshals - Initial Contact:

S: (In Goodfield's car, en route from airport to Lalita's school) "Goodfield also informed me that he had learned that two federal marshals would likely be on the reservation at the time we expected to be there, and he had asked them to meet us in order to explain circumstances on the reservation...
1:30 - 2:00 p.m.
Prior to arriving at the reservation we met the marshals at an appointed rendez-vous. After hearing their descriptions, and being solicitous to safeguard the Commission despite the informality of this visit and my entire dependence on voluntary cooperation, I asked if they had time to accompany us for what I expected to be thirty minutes at most. They agreed an undertook to introduce me to school officials on the reservation."

R: "The fifth charge [that Chairman Allen knew that Dr. Goodfield had solicited the involvement of the U.S. Marshals Service in an unspecified manner] is a strange, non-specific wording of my statement that Goodfield had requested Marshals, whom he knew to be nearby, to explain circumstances on the reservation. Stated thusly it is correct, and to all appearances unobjectionable. It should now be added, however, that shortly before the trip -- when I thought only Goodfield and I were going -- I learned by long distance telephone call from my assistant of a request from Goodfield that I seek support of U.S. marshals. I ordered my assistant in the strongest terms to deny that request and to avoid dealing with Goodfield or anyone else concerning it. Nor did I at any time alter that position.
The summary by Peter Taylor falsely attributes to me a reliance on the U.S. Code to compel marshals to accompany me. To the contrary, I asked them only for an introduction, and then to stand aside...Indeed, their distance (pursuant to our agreement) proved to be inconvenient when I needed assistance in checking Dr. Goodfield (but did not wish to raise a panic in a crowded school ground)."

H: "(1319) Mr. KOLBE: You were met on the reservation, as I understand it, by marshals. They did not accompany you to the reservation.

Mr. ALLEN: That's correct.

Mr. KOLBE: They met you there and then, subsequently, left you while you were still on the reservation?

Mr. ALLEN: Yes.

Mr. KOLBE: What was the purpose of asking the marshals to meet you there?

Mr. ALLEN: I did not ask them to meet me. Dr. Goodfield had found that the marshals were there and asked them to join us to describe the circumstances...(1334) His contacts led him to request them to describe the circumstances on the reservation...(1337) His awareness of their presence, and his contact with them, led him to request them to describe for us the circumstances on the reservation.

Mr. KOLBE: Elaborate on that. Describe the circumstances on the reservation.

Mr. ALLEN: Where are the roads, where are the schools, that sort of thing.

Mr. KOLBE: Okay. You were not aware of their presence until you arrived on the reservation.

Mr. ALLEN: That's absolutely correct, until I arrived."

Presence of U.S. Marshals - Role During Incident:

S: (Following Lalita entering Dr. Goodfield's car at the high school) "While they [Dr. Goodfield and Lalita] sat there in the traffic I consulted with the marshals, making known that I wished to assure her safe delivery at home. After that, I walked to Dr. Goodfield's car and made known my expectations. I then joined the marshals and proceeded, following the Goodfield car, in the direction of Lalita's home...."

H: "(1362) Mr. KOLBE: There is a very explicit statement in the Chairman's letter that says that the marshals directed the principal of the school an other staff at the school not to notify anybody that they were there or, at least, I think thirty minutes was the time given--not to notify anybody that you were on the campus of the high school, to tell anybody that you were there-- in other words, not to alert, I gather, the parents, the mother; is that correct?

Mr. ALLEN: I believe that that may be correct, that the marshals may have done that.

Mr. KOLBE: Did you direct them to do that?

Mr. ALLEN: Certainly not.

Mr. KOLBE: Do you have any idea why they would do that?

Mr. ALLEN: I can only guess at that, and I would prefer not to guess about their motivations.

Mr. KOLBE: Were the marshals there, as far as you were concerned, strictly for the purpose of giving you directions of-- of a guide, a tour guide?

Mr. ALLEN: No.

Mr. KOLBE: Or did you fear for your safety?

Mr. ALLEN: No, I did not fear for my safety. I asked, after having the situation described to me by the marshals, and having the sense that they were known on the reservation, I asked them to give an introduction, and nothing more, which they did and stepped aside.

.....

{1490} Mr. ALLEN: ...I did not allow [Dr. Goodfield to leave the reservation with Lalita]}. I sought to prevent that. What I did, failing to prevent his taking the child into his car, was then to conspire, in effect, with the marshals to guarantee that they would not leave the reservation.

Mr. KOLBE: The marshals were with you?

Mr. ALLEN: Yes, the marshals were with me, but the marshals did not hear the direct exchanges that I heard.

Mr. KOLBE: They would not, then, be able to testify that you attempted to prevent Dr. Goodfield--

Mr. ALLEN: They could testify to that because I consulted with them before and after and they, at least, witnessed me going over to dissuade him from what he was doing. That is recorded on tape, indeed, and so there is not a question about that. But what they cannot testify to is in the circumstances whether, in fact, Dr. Goodfield had said or done something that would have, in their eyes, rendered him suspect in some way."

Events at the School Bus:

S: "3:15 - 3:30 p.m.

When we approached the school bus at the high school parking lot, an unidentified minor came up to me and asked, "Are you looking for Lita?" She proceeded to say that Lita was on the bus. I then invited Dr. Goodfield, who carried personal effects for the minor child, to inquire whether she might speak to us. He leaned into the door way of the bus, called for her by name, and asked if she would speak to us for a moment. She responded to her name, agreed to speak, arose from the rear of the bus and exited. When she alighted on the sidewalk, the brief interview commenced then and there (rather than in a school office as I had projected).

I learned rather quickly that Lalita felt restrained against her will on the reservation, preferred to dwell with her foster parents, and had never had an opportunity to express that preference before a competent government entity. From her own lips, many of the previous reports that I had regarded as speculative were validated, and with a peculiar and affecting emphasis as she declared, 'I am an outcast here.'

At that point I was prepared to make an effort to seek her mother and would have expected her to regain her bus seat. The bus was then on the verge of leaving without her. Her interview with Dr. Goodfield, however, became impossible to break off. I had already offered to carry her home in the marshals car (would she miss her bus). Instead, as a result of prospects entertained in her exchange with Dr. Goodfield, she walked away from the school and the bus, he boarded his own car and prepared to leave, and she entered the car with him."

R: "I had aimed to speak to Lalita in her Principal's presence. Circumstances which I have already recounted altered that. We met her, not at her school, but at the high school. As we approached and headed for someone in authority who could have aided us, we were met by a minor, as I related, who directed us straight to Lalita. I met her there, on the sidewalk by her bus, after she had descended and been first met by Dr. Goodfield. Rather than proceeding to the protective precincts of an inner office -- as designed -- he immediately showed her the aforementioned personal effects. She began to weep. As a consequence, we were rather more concerned to comfort and console her than anything else. In that process, the conversation that ensued afforded me space for the only question I really had -- namely, whether anyone had ever asked her where she wished to live. Shortly thereafter, as the tapes show, I asked her if she wished to send a message back with me -- the bus was still in the background then. I was trying to break off the interview, just as Dr. Goodfield became increasingly intense. I had tugged at his arm, pleading that we find a school entrance and go inside. A few minutes more -- his offer of a ride off the reservation -- school buses leaving -- and I began to seek the marshals, first looking around for them (for I did not know if they were still there), then spotting them and going to seek their aid...

My statement offers my conclusion that no competent government entity had heard Lalita's prayer. The conclusion was based on Lalita's response to very specific questions within her knowledge and not on her judgement of the competence of governmental entities. For example, her initial response to my query had been, `yes, lots of people.' Her friends, teachers, and school mates had asked her where she wished to live. I therefore asked her whether, besides those, any court, or judge, or other kind of official had ever asked her. She said no...

...[E]ven the edited videos reflect my efforts to dissuade Goodfield -- finally successful. The videos show me trying to say good- bye, tugging at his elbow, and finally warning him of a serious crime."

H: "{1388} Mr. KOLBE: ...you subsequently found the child, Lalita, on the bus?

Mr. ALLEN: Yes.

Mr. KOLBE: Dr. Goodfield went into the bus, or into the front of the bus, and called to her and she came off voluntarily?

Mr. ALLEN: That's correct.

.....

{1410} Mr. KOLBE: The Chairman says she came off the bus crying, she was terrified.

Mr. ALLEN: No, that's absolutely incorrect. She cried after she descended the bus, spoke to Dr. Goodfield and looked at a photograph of her dog. That's when the tears began.

.....

{1431} Mr. KOLBE: Subsequently, apparently, according to your statement, the bus had been waiting and subsequently

actually left while the interview was still going on?

Mr. ALLEN: Yes.

Mr. KOLBE: Most schools that I know of have a very firm policy that a child may not simply drive away from the school with somebody that is not a parent, that they don't have explicit instructions to allow that child to go with.

Mr. ALLEN: I agree with that. That is true of the schools I know and have run.

Mr. KOLBE: Did you convey this to Dr. Goodfield when he said he was going to take her home?

Mr. ALLEN: Well, by the time he said he was going to take her--...{1454} yes, Dr. Goodfield was certainly was informed that this is not expected. There was considerable effort on my part, to be perfectly candid with you, to say goodbye, to break off an interview that I thought portended trouble and to get the child on her bus while it was still there.

I regret, extraordinarily, that I could not succeed in those efforts, but I did make efforts.

Mr. KOLBE: You had completed your interview?

Mr. ALLEN: Yes.

Mr. KOLBE: Did it occur to you at that point, that you should leave the premises promptly, that there was no further reason for you to be involved?

Mr. ALLEN: No. I would have considered it a dereliction given what was happening after that point, for me to simply walk away. I instead went to the marshals and consulted with them about whether, indeed, there could be any protection afforded...

{1479} My first effort has been, and this I'm certain will be recorded on tape, to not have an interview occur on a crowded schoolyard sidewalk, but to get them inside. And it was, in fact, not possible to steer them inside the building. Therefore it was not possible to take advantage of the kind of opportunity that you now describe.

T: "I asked Lalita the question immediately on the sidewalk as she descended the bus. She descended the bus freely, she was not removed from the bus. I asked her the question there and she answered. Everything that happened from that point forward -- and you need only to review the tapes yourself to see that and, if you were present, you will remember this --did not involve a taking of anybody. It involved, indeed, a psychologist taking her into his car. I was not in the car with them. I was in fact with two United States marshals. I, in fact, went to the psychologist and said he mustn't do this, and then consulted with the marshals as to what we should do to protect this girl. Then, once Dr. Goodfield came to his senses and complied with my insistence that he not do this and, given the fact that by then the buses were gone, the child [had] to be taken to her home. That's precisely what happened.

Returning Lalita to Home:

S: "Along the way [to Lalita's home] Mrs. Thurza Altaha, Lalita's natural mother, passed us in a pick up. It as Lalita

who identified her. She remained just before us until reaching the turn-off to her home. There, without directions, she executed the required left turn, leaving the roadway and leaving our route unimpeded. Dr. Goodfield immediately turned in after her. She then stopped just at the start of the intersecting roadway, and we stopped behind her, just short of the crossing highway. The marshall and others stopped on the shoulder of the crossing highway.

3:50 p.m.

We descended our vehicles and approached Mrs. Altaha who remained at first seated in her truck. I identified myself and offered identification. She afforded me a brief space to say that I had come to hear from each of them, if they wished to tell me, what the situation was, and to inquire how court appearances were being handled and whether Lalita was informed. I emphasized that not only Lalita but also that she, Mrs. Altaha, had rights and my sole concern was that they were all respected. She brushed aside my queries and directed her attention to Lalita, who approached in company with Dr. Goodfield immediately behind me. The ensuing exchanges were tense and not informative. She wished to leave with her daughter -- whom she instructed to get into the truck. Dr. Goodfield detained the child a moment or two longer in private interview and then rejoined me in his own vehicle."

R: "[Charge] That I identified myself to Mrs. Altaha as Chairman of the Commission.

This charge is false -- and inconsistent with my statement, which says that I identified myself (i.e., by name) and showed my identification (which states that I am a member of the U.S. Commission on Civil Rights and nothing more)...

[Charge] That I questioned Mrs. Altaha concerning a court procedure as she sat at the wheel of a parked truck.

This charge is false. As my statement explained, I did no more than to characterize questions I wished to ask her. She listened politely but declined to acknowledge. She descended the truck and encountered her daughter and Dr. Goodfield. I made no further attempt at an interview. As Mrs. Altaha spoke with Goodfield and Lalita she objected -- by gesture -- to an approaching video camera. Upon her cue I sought to obstruct and remove the camera. (At this point, Goodfield did serve copies of papers, which I did not know of in advance, to Mrs. Altaha for herself and Lalita. I still do not know whether he was deputed by the Desrochers attorney to accomplish this act.)...

We were not stopped, nor even signalled by Mrs. Altaha. Mr. Destro has derived this description from the White Mountain Apache Nation 'Press Release of 9 February 1989' and like sources..."

Arrest of Chairman Allen:

R: "I was held for five hours in the Gila County Jail, by the Arizona State Patrol, at the behest of the FBI, two hours away from the reservation...

The false arrest was not consequent to anything that actually happened on the reservation. The criminal complaint was filed by Mrs. Altaha after she arrived at her home with her daughter at her side. She reported Lalita missing and kidnapped, even as Lalita stood by her. I said that evening, what I repeat now. It was a misunderstanding. It was a misunderstanding. She was wrong to do what she did, but I understood it. She was rightly ticked off. I would not pursue the issue legally for that reason, and therefore would not wish anyone to make a federal case of it. I say this even though I have reliable evidence that, not only Lalita stood by Mrs. Altaha's side, but also a BIA policeman who prompted Mrs. Altaha in her report. This, at least, must be probed in the fuller inquiry to be conducted by Senators McCain and Deconcini, since they will be investigating at all events..."

STATEMENTS AND CHARGES MADE CONCERNING WHITE RIVER INCIDENT

D- Letter from Commissioner Robert Destro, March 1, 1989
J- Letter from Reno Johnson, Chairman of White Mountain Apache Tribe.
R- Press Release from White Mountain Apache Tribe, February 9, 1989.
Ta- Memorandum from Peter Taylor, Senior Counsel for Senate Select Committee, February 9, 1989.

Commission's relation with Dr. Barry Goodfield:

D: "3. That you acted in concert with Dr. Barry Goodfield (p.1) knowing: a) of his involvement with the Altaha case; b) of his involvement with the Durochers [sic] (the foster parents); c) of his intention to contact the child, if not at their behest, then certainly on their behalf; d) of his intention to use 'photographs, a note, and perhaps other ephemera from them' to influence the child; and e) that he had solicited the involvement of the U. S. Marshal's Service;"

Ta: "There was a second film crew also, this one associated with Dr. Barry Goodfield, who was accompanying Commissioner Allen. Six of the fourteen people in this entourage were apparently accompanying Dr. Goodfield...If I am not mistaken D. Barry Goodfield, who is from the San Francisco area, is the same person who was involved in the Keetso case at Navajo. There are some serious questions about his medical or professional credentials."

Presence of U.S. Marshals - Initial Contact:

D: "5. That you solicited the assistance of representatives of the United States Marshals Service and told them who you were if only to assure them that your visit was 'informal' and their cooperation 'voluntary';"

Ta: "The U.S. Marshals were apparently not arrested. The way in which they became involved is that they were at the reservation to deliver some warrants. While they were there, Commissioner Allen and his party met them and Commissioner Allen showed them a copy of a statute that provides that the United States Marshals shall provide assistance to the Civil Rights Commission 'upon request'."

Events at the School Bus:

D: "6. That the child was called from the bus, and that you questioned her without any adult that she knew (such as the school principal, a teacher, or her mother) present;
7. That you asked a 14-year old child questions concerning the 'competence' of a government entity (apparently the tribal court) [p. 4], the jurisdiction of which is not a matter within

the scope of the Subcommittee's investigation:

8. That you did nothing when it became clear to you that the child would miss her bus and knew that missing the bus would entail taking a ride from men she did not know (yourself included);

9. That you did nothing to intervene on her behalf when Dr. Goodfield's interview became (in your words) `particularly intense and impossible to break off,' (p. 4);

10. That Dr. Goodfield offered her unspecified `prospects' during the course of this `intense' interview;"

J: "...Mr. Allen and his accomplices then proceeded to board the school bus on which the child was preparing to return home, removed the child, reduced her to tears obviously for camera effect, and over her tearful objections led her from the bus, placed her in one of the group's vehicles and immediately left the school grounds."

R: "The men allegedly began questioning the child with cameras rolling and microphones in her face, walked her to a vehicle and placed her inside. During the next half hour, the girl was bombarded with questions...At the junior high school several men asked school bus driver Gillespie Childs if Lalita was on his bus. He told them he did not know and proceeded to the high school to pick up other students. At the high school, five of the ten men in the party boarded the bus, identified Lalita and took her off the bus. They then drove her to Cedar Creek."

Ta: "Commissioner Allen went onto the school bus and removed the girl from the bus -- apparently against her will -- and placed her in one of the cars and drove off with the girl...It is also clear that Commissioner Allen was not alone in boarding the bus. The release indicates that <u>five</u> men boarded the bus to remove Lalita, and that she was hysterical. They apparently placed her in a car and bombarded her with questions while the cameras rolled."

Returning Lalita to Home:

D: "11. That you joined a `caravan' of vehicles transporting the child away from the school, even though you appeared uncertain that her mother's home was, in fact, Dr. Goodfield's destination, for it was not until <u>after</u> you left the school premises that the `caravan' stopped by the roadside and Dr. Goodfield emerged to `inform [you] that he was, indeed, taking Lalita to her home' (p. 4);

12. That you questioned the child in Dr. Goodfield's car, or were present while he interviewed her there;

13. That you identified yourself to Lalita's mother, Ms. Altaha, as the Chairman of the Commission and a member of the Subcommittee;

14. That you questioned Ms. Altaha about the conduct of a court proceeding while she was seated behind the wheel of a truck parked in a roadway because she had (apparently) chased you down

and blocked further travel by the 'caravan';"

J: "During the 30 minute ride, the child was subjected to continuous, repetitive questioning. She was handed a Pima County Superior Court notice of deposition signed by her former foster parents' attorney...Later that afternoon, Mr. Allen and his associates were pursued and stopped by the child's mother. The child's mother confronted Allen and one Dr. Barry Austin Goodfield and demanded the immediate release of her daughter. Mr. Allen and his associates released the child and immediately left the reservation."

R: "They then drove her to Cedar Creek. Her mother pursued the vehicles after being called to the school by the girl's brother and stopped them at the turnoff to her home. A verbal confrontation resulted in the release of Lalita."

Ta: "At the time Lalita Altaha was removed from the school bus, her brother was on the bus and took down the license number of one of the four cars. He immediately called his mother who lives in Cedar Creek, the direction in which the four car caravan was headed. She somehow succeeded in blocking the road they were going to travel and apparently stopped the group and got the girl back."

Arrest of Chairman Allen:

D: "You do not mention:
16. That you were detained at gunpoint and held in jail by local law enforcement authorities;"

J: "Acting on these facts which clearly establish that an unlawful abduction of a minor child had taken place, a request for assistance from local law enforcement agencies was immediately issued and the suspects, including Mr. Allen, were subsequently stopped by law officers of the Arizona Department of Public Safety and were detained for questioning by tribal law enforcement officers."

R: "At 4 p.m. Thurza Altaha, Lalita's mother, contacted Whiteriver Police and asked for assistance because "newsmen were harassing them." Officers Virgil Danford, Jr. and Abner Tessay were dispatched to Cedar Creek where they spoke to Thurza Altaha. At that time the Altahas gave them a description of the vehicles and license numbers. Police dispatched an all points bulletin requesting assistance from neighboring law enforcement agencies asking that they apprehend the vehicles, still not positive of the identity of the men. The vehicles were stopped in Globe at gunpoint by Arizona Department of Public Safety officers who spread-eagled and frisked the men and took them to jail. They were detained until Whiteriver Police Chief Andrew Kane and Bureau of Indian Affairs Criminal Investigator Vince Hubbard arrived to question them. At that time, William B. Allen identified himself as Chairman of the Subcommittee on Indian

Civil Rights Enforcement of the U.S. Civil Rights Commission."

Ta: "She [Mrs. Altaha] also called the tribal police to report the incident. The tribal police issued an APB for the caravan for a kidnapping charge. When the caravan left the reservation around Globe, the Arizona State Police stopped all four cars and placed all 14 of the people in the group under arrest. They were detained in the local jail for three hours -- from 6:00 p.m. to 9:00 p.m. --and apparently all in the party, including Commissioner Allen and the two U.S. Marshals, were charged with some offense...

FOLLOW UP

...From the news release, it is not clear whether Commissioner Allen and the others were in fact charged with a state offense. It is clear, however, that they were not released until White Mountain Apache law enforcement officials visited them while they were in the custody of the state police...

THIRD UPDATE

...Ralph [Reeser, Congressional Liaison for BIA] says that the reason the Arizona State Police stopped the caravan was that they thought the group still had the young girl. After the group was taken into custody, Commissioner Allen called the Attorney General of the United States for assistance...No state charges have been filed against any of the parties, and in view of the fact the activity occurred on the reservation, it may be that no state offense occurred. Since the tribe does not have criminal jurisdiction over the non-Indians, no tribal charges have been filed -- at least that I know of. However, the possibility of federal charges remains."

San Gabriel Valley Tribune
Wednesday, April 5, 1989
B4

TRIBUNE
An Independent Newspaper

The San Gabriel Valley's Voice of Truth and Reason. Dedicated to the enlightenment of man, the furtherance of a free society, the condemnation of private enterprise and to honest, open and limited government.

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EDITORIALS

Allen flap clarifies choices over rights

The controversy over William Allen may have brought the day closer when Americans decide whether promoting racism is a legitimate way to get beyond racism.

The professor of political science at Harvey Mudd College in Claremont who chairs the U.S. Commission on Civil Rights is the target of the Los Angeles Times and other papers across the country. They want his ouster for his involvement in an event last February at an Indian reservation in Arizona.

Allen went to the reservation to interview 14-year-old Lalita Alitaha, an Indian girl at the center of a tragic custody battle between the white couple that had raised her and the Apache woman who bore her.

Lalita's adoption was overturned in 1982 and last year her adoptive parents turned her over to the natural mother she never had known, to a reservation lifestyle for which she was not prepared.

Allen simply wanted to ask Lalita something the courts hadn't — whom she wanted to live with. The girl's natural mother was upset by Allen's questioning of the daughter without her consent, and the flap started. It was a complicated misunderstanding but Allen did nothing illegal or unethical.

In fact, Allen might be accused of disregard for his duty if he had not tried to talk to Lalita, for the handling of the case certainly raised civil rights questions. There wouldn't have been any controversy if it had been anyone but Allen.

The controversy has little to do with Lalita Alitaha — it has to do with the current state of civil rights in America.

Since the 1960s, the consensus in favor of civil rights has turned into a war between those who see civil rights as protections for individuals and those who view them as entitlements for groups.

Martin Luther King, Jr. and many others looked forward to the day in our society when individual merit — and not the color of one's skin — would determine how one was treated. But other civil rights leaders abandoned this and embraced avowedly race-based programs.

The programs had different names — quotas, set-asides, timetables, affirmative action — but they were all the same. They gave blanket benefits to whole categories of people simply because of their race. It didn't matter whether you ever faced discrimination or not. And civil rights thus became a growth industry as minority groups sought to be declared protected classes.

It just happens that Mr. Allen, like Rev. King, is devoted to a color-blind Constitution.

He doesn't believe in racism to end racism. He doesn't believe another injustice rectifies past injustices.

This sets Allen apart from most of the current civil rights establishment, including Arthur Fletcher, the man being groomed by the White House to replace him. Fletcher wrote the original executive order mandating that a certain proportion of federal contracts be awarded solely on the basis of race.

In the past five months since he replaced Clarence Pendleton as chairman of the controversial panel, Allen has waded in fearlessly. So it's no surprise he has placed the commission in deep trouble.

He is sorry his Arizona investigation got out of hand but not sorry about upsetting the other commissioners. In fact, he has called them impotent and asked them all to resign.

President Bush has Fletcher in the wings if Allen will voluntarily step down. Allen said no — unless the president asked him personally — and that hasn't happened yet.

With a shredded budget and feuding, discredited membership, the commission may have to be put to rest by Congress. It has always been an on-again, off-again bully pulpit with limited respectability.

Allen may have to go. But he has made his point to the commission and the public — we will have to decide whether fellow citizens should be judged on their merits or as members of a racial group.

Allen may be the target in the recent furors, but he is not the villain. He is right: the Constitution cannot be both color-conscious and color-blind. It can't sanction racism against some and forbid it against others.

One day we will have to choose.